Supreme Court U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

ROBERT LANDAU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly hold that Petitioner, salaried President and sole shareholder of a corporation, was barred as a matter of law from alleging as a defense to a "responsible person" action under Internal Revenue Code ("IRC") 26 U.S.C. § 6672, that Petitioner was not responsible as a result of the effects of his addiction to drugs and alcohol during the tax period?

2. Did the Court of Appeals properly interpret IRC § 6672 as "a matter of policy"?

PARTIES BELOW

The parties below in the Court whose judgment is sought to be reviewed are as follows:

United States of America, Defendant and Third Party Plaintiff-Appellee;

Robert Landau, Third Party Defendant-Appellant; and

Nathan Unger, Plaintiff.

As none of the parties are corporations, there are no parent companies or non-wholly owned subsidiaries thereof.

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CITATIONS OF ORDERS

The following are the citations of the reports and opinions and orders entered in this case by courts or administrative agencies.

United States v. Landau, 956 F. Supp. 1160 (S.D.N.Y. 1997)

United States v. Landau, 155 F. 3d 93 (2d Cir. 1998), rehearing denied, ___ F. 3d ___ (Nov. 19, 1998).

JURISDICTION IN THIS COURT

1. The date the judgment or order sought to be reviewed was entered is August 25, 1998.

2. The date the Petitioner's Petition for Rehearing with the suggestion of rehearing in banc was denied is November 19, 1998.

3. Petitioner does not rely on Rule 12.5 of this Court.

4. The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1254(1)

5. The United States is a party to this case, and service of this Petition is being made upon the Solicitor General of the United States as required by Rule 29.4(a) of this Court.

STATUTE INVOLVED

The statute involved in this case is 26 U.S.C. § 6672, the text of which is set forth at Appendix "E" and Appendix "F".

STATEMENT OF THE CASE

Background Facts

A. This action arises from a one hundred percent penalty assessment filed by the Internal Revenue Service (the "IRS"), pursuant to Internal Revenue Code ("IRC") (26 U.S.C.) § 6672 (A 42)[1] against Petitioner Robert Landau ("Landau" or "Petitioner") and Nathan Unger ("Unger").

Landau was the sole stockholder, President and Chief Executive Officer of Robert A. Landau Associates, Inc. ("RLA") during the relevant tax periods, and Unger was Chief Financial Officer (A 4). During its last years of operation, RLA, which was founded by Landau in 1975, employed over 100 people, was engaged in the business of marketing and advertising nationally promoted brands of products and services, and had approximately $30 million in revenue (A 4-5, 19).

In or about 1982, Landau was introduced to cocaine, and, by the Spring of 1983, had become totally addicted to its use, such that he was unable to discharge his duties at RLA (A 6). Soon thereafter, RLA began to experience financial difficulties (A 6).

In 1983, Landau promoted Unger, an officer of RLA who several years prior had been RLA's Controller, to the post of Senior Vice President and Chief Financial Officer (A 5). Landau simultaneously gave Unger a personal power of attorney so that Unger could write checks on Landau's account to pay personal bills (A 6). These actions were undertaken because Landau feared that as a result of his drug addiction, he was unable to function normally, and did not want his bills to go unpaid (A 6).

In December, 1983, Landau began consuming huge quantities of alcohol in addition to the cocaine (A 6). In May, 1984, Landau entered a drug rehabilitation hospital, but left

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[1]References to "A___" refer to the Appendix herein. References to "Tr.___" refer to pages in the trial transcript.

shortly thereafter with his addiction uncured. He continued to ingest daily 6 to 8 grams of cocaine and a quart of alcohol (A 6).[2]

Both Landau and Unger had full authority to pay bills, sign checks and negotiate contracts on behalf of RLA during the relevant tax periods (A 5,6). In January, 1984, Landau obtained a $2.3 million dollar bank loan, secured by his homes and his shares of RLA, and invested the loan proceeds into RLA (A 6). At the same time, Landau notified major clients of RLA to inform them of the material change in the company's finances, and also negotiated termination of a major contract which caused RLA to suffer substantial losses (A 6).

During the first three quarters of 1984 (the "Tax Periods"), RLA duly filed employers' quarterly federal income tax returns, but failed to pay $1,046,376.30 of the amount due on account of withholding taxes for those three quarters (A 6). RLA declared bankruptcy on September 14, 1984, and the delinquent taxes remained unpaid (A 5). Thereafter, Landau pleaded guilty to wire and mail fraud charges arising from certain of his actions on behalf of RLA (A 6).

B. Pretrial Proceedings

In November, 1987, the IRS made separate one hundred percent penalty assessments against Landau and Unger in the amount of RLA's tax deficiency, pursuant to IRC § 6672 (A 7). After the Government seized certain of Unger's funds, Unger commenced an action in the United States District Court for the

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[2]One of Landau's expert witnesses testified at the trial that one half of one gram of cocaine will impair judgment, memory and ability to think (TR 117). Landau was thus ingesting, on a daily basis, as much as twelve to sixteen times the amount of cocaine necessary to affect his reasoning, plus a quart of alcohol a day (TR 445-446).

Southern District of New York, in 1990, for a refund and related relief (A 7). The Government answered and counterclaimed against Unger, requesting judgment for the unpaid balance of the assessment plus interest, and also commenced a third party action against Landau to reduce to judgment the IRS assessment against him, plus accrued interest (A 7).

In 1993, after extensive pre-trial discovery, including depositions of Landau, his wife, several of his doctors, and co-workers at RLA, the Government moved for summary judgment against both Landau and Unger. On February 17th, 1994, the District Court (Whitman Knapp, Senior District Judge) granted the Government's motion in full, finding that Unger was a "responsible person" within the meaning of IRC § 6672, and also holding that Landau's "voluntary intoxication" was no defense to § 6672's willfulness requirement, which the District Court likened to a criminal statute requiring only general, but not specific, intent (A 7). See February 17, 1994 Opinion and Order.

However, on March 16, 1994, the District Court subsequently granted Landau's motion for reconsideration of summary judgment, on the grounds that the Court "may have erred in [its] conclusion that [its] own interpretation of the medical evidence taken together with [Landau's] testimony....is the only possible reasonable interpretation" (A 35).

Simultaneous with its ruling, the District Court certified the matter for interlocutory appeal to the Court of Appeals, pursuant to 28 U.S.C. § 1292(b) (A 36). The Court of Appeals denied Unger's petition for interlocutory appeal (A 8, Fn.), but, notwithstanding the District Court's certification, the Government did not seek to pursue an appeal as to the denial, on reconsideration, of summary judgment against Landau.

Subsequently, the District Court vacated its summary judgment against Unger in light of the intervening decision in United States v. Rem, 38 F. 3d 634 (2d Cir. 1994), and the case proceeded to trial as to both Landau and Unger (A 8).

C. The Trial

The case was tried before Hon. Whitman Knapp, Senior District Judge, and a jury of eight in December, 1996 (A 8). Landau called both expert and fact witnesses, including four doctors who testified both as to the effects of drug and alcohol addiction, and that Landau was deeply addicted to both drugs (cocaine) and alcohol during the Tax Periods (A 8-9).

Landau also elicited testimony from a co-worker at RLA who testified that during the Tax Periods, Landau frequently did not come into the office, and when he did, he was not dressed in business attire, behaved erratically and inappropriately, and did not act as the boss (A 10). Rather, Landau's subordinates at RLA simply ignored his many inappropriate instructions (A 9), so that RLA, in reality, was being run by its other officers, including Unger, as its Chief Financial Officer.

The testimony of Landau's co-worker, Eugene Lewis, included the following:

At Landau's behest, meetings were frequently conducted at bizarre hours (Tr. 361-362), and/or while he was under the influence of drugs and liquor (Tr. 364-365); Landau had to be literally dressed and propped up by his subordinates to demonstrate that he was still alive (Tr. 470); Landau's "decisions" were "crazy" and accordingly ignored by the other officers and employees of RLA (Tr. 408); Landau was "almost never there", and RLA business was generally carried out without him (Tr. 405).

Landau's wife and Landau himself also testified as to his addiction, and his abnormal and bizarre behavior during the Tax Periods (Tr. 413-418, 437-461). In one particularly telling line of testimony, Landau's wife testified that Landau even forgot to

attend his own birthday dinner, as a result of his being consumed by his addiction (Tr. 418).[3] Landau testified that although he signed documents during the Tax Period, while in a drug induced stupor, he had no idea what they were and had not read them (Tr. 458). The testimony of Carole Landau demonstrated that Landau was virtually a walking zombie during the Tax Period (Tr. 413-418), essentially unable to function, except to obtain and consume huge quantities of cocaine and liquor.

Landau's doctors testified as to the effects of addiction upon Landau, which were described as including, among other things, that Landau was: "deeply under the influence of cocaine" [during the Tax Periods], and "totally out of control of his mood, behavior and thinking" (Tr. 122); "not thinking rationally during this period of time", including paranoia and grandiosity (Tr. 69-70); lacking the ability to think rationally (Tr. 72-73); using, at various times during the relevant period, 8, 5, or 3 grams of cocaine per day plus a quart of alcohol (Tr. 61-62, 445), when quantities of only half a gram of cocaine are "absolutely sufficient on a daily basis to impair judgment and thinking ability and memory" (Tr. 117), from which one could not recover for many months, or even a year, following the discontinuance of drugs (Tr. 72, 73); suffering from alcoholic blackouts (Tr. 57-58); "unable to stop using cocaine" and suffering from "chronic cocaine abuse...consistent with somebody who has a lot of cobwebs in between the time they are using" (Tr. 309-10); and as to whom "the question of what he was saying was fabrication, whether it was true or not, fantasy very difficult to determine. There was not always a coherent, logical flow in his mannerisms and thought

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[3]Subsequent to the Tax Periods, Landau ultimately recovered from his addictions, and, after pleading guilty to federal mail and wire fraud violations (A 6; Tr. 454-5), he was able to repair his life (Tr. 420, 454).

process." (Tr. 240)

Unger testified, directly contrary to the testimony of Landau's various doctors[4] and other witnesses, that he was totally unaware of Landau's addiction (A 19). Unger further testified that despite his de jure authority to sign checks, pay bills, and enter into contracts on behalf of RLA, his actual authority was far more circumspect, and was limited to doing whatever Landau instructed him to do (A 5). Unger also testified that he periodically prepared a list of creditors, putting the IRS at the head of the list (A 6). Unger did not call any other witnesses in support of his contentions (A 8). Unger's testimony - which was directly contrary to that of Landau and the other witnesses - created a credibility issue to be resolved by the jury.

The Government called no witnesses whatsoever, either fact or expert, but submitted a substantial amount of documentary evidence (A 9). The Government cross-examined Landau and the other witnesses on Landau's ability to sign documents and checks, enter into contracts, and the like during the Tax Periods (A 9).

As to Landau, the Court's charge to the jury made clear that evidence of Landau's drug and alcohol addiction was intended to prove that the effects of his addiction rendered him unable to function, such that, notwithstanding his corporate title and ownership, he was not effectively in control of RLA:

> "Respecting Mr. Landau...His contention is that due to his addiction to alcohol and drugs, especially drugs, cocaine, he was absolutely unable to significantly participate in the decisions of the corporation and was unable to be aware of the fact that the taxes had not been paid and that money

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[4]One of the witnesses, Dr. Chodock, had visited the premises of RLA, and testified that he advised Unger to leave the firm if Landau could not kick his addiction (Tr. 244).

was being used for other purposes.

Now, that is a defense if it is established, but it is a very narrow defense. It is not enough to prove that his addiction caused him to be lackadaisical, caused him to make silly decisions, not enough to prove that, for all I know, that the addiction may have been responsible for the whole downfall of the corporation because of the silly decisions he made pursuant to that. But that's no defense.

***

With Mr. Landau...he says in the first place that this addiction made it impossible for him to significantly participate in the decisions of the corporation, and in the second place, even if you conclude that he could significantly participate in those decisions, he, as I described it, was unable to be significantly aware, 'consciously' was the word I used in the questions I am going to submit to you later, consciously aware of those two facts." (Tr. 812-814)

Petitioner submits that the District Court's charge, the essence of which is that the effects of drug and alcohol addiction constituted "a very narrow defense" if it could be shown that "he was absolutely unable to significantly participate in the decisions of the corporation" (Tr. 812-814), was a proper charge of well-settled law regarding IRC § 6672.

Landau does not contend that drug and/or alcohol addiction, in and of themselves, should constitute a defense under IRC § 6672. Landau's argument is only that the effects of such addiction may be considered among the totality of circumstances in determining whether Landau was a "responsible person" under § 6672 and wilfully failed to pay over withholding taxes to the

IRS. Petitioner submits that Landau's defense properly raised an issue of fact to be decided by the jury, and not a matter of law for the Court.

D. The Verdict and Post-Trial Motions

In response to special jury interrogatories, the jury found Landau not to be a responsible person during the Tax Periods, but held Unger responsible (A 10).

Petitioner submits that having resolved the credibility and fact issues, particularly as to Landau's addiction, in Landau's favor, the jury verdict in favor of Landau was virtually compelled by the trial evidence.

The Government did not dispute that Landau was seriously addicted to both cocaine and alcohol during the Tax Periods (Tr. 692, 708). Moreover, the Government did not call a single witness to dispute the compelling testimony from Landau's doctors as to the extent of Landau's addiction and the effects of such addiction on Landau. (See pp. 4-7 infra).

On post-trial motions, the District Court set aside the jury verdict as to both Landau and Unger, sua sponte granting Unger judgment as a matter of law, and granting the Government's motion for judgment as a matter of law against Landau. Unger v. United States, 956 F. Supp. 1152 (S.D.N.Y. 1997); United States v. Landau, 956 F. Supp. 1160 (S.D.N.Y. 1997) (A 33), aff'd in part, rev'd in part, 155 F. 3d 93 (2d Cir. 1998), reh'd denied, ___ F. 3d ___ (Nov. 19, 1998) (A 38).

As to Landau, the District Court held that voluntary intoxication cannot as a matter of law be a defense to liability under § 6672, even assuming that the evidence fully supported the jury's verdict, 956 F. Supp. at 1161 (A 30). The District Court drew an analogy to criminal law, and the principle that voluntary intoxication was a defense to specific but not general intent crimes. The District Court held that § 6672 did not require a

finding of specific intent, and therefore concluded that Landau's alcohol and cocaine addiction could not, as a matter of law, negate the conclusion that he was a responsible person during the Tax Periods, or that he willfully failed to remit taxes to the IRS. 956 F. Supp. at 1162-3 (A 30-33).

The District Court also set aside the jury verdict against Unger, on the ground that the jury had been confused by Unger's testimony, and entered judgment in favor of Unger as a matter of law, Unger v. United States, 956 F. Supp. 1152 (S.D.N.Y. 1997).

E. The Court of Appeals Decision

The Court of Appeals for the Second Circuit agreed with the District Court that voluntary intoxication "cannot be a defense to responsible person liability under § 6672 in the circumstances of this case (A 25-26)." The Second Circuit accordingly rejected Landau's claims that: (a) he could not have been a "responsible person" under § 6672 because he lacked effective control due to his compulsive and excessive use of cocaine and alcohol; and (b) even if he was a responsible person, he could not be regarded as having wilfully failed to remit the taxes because his substance abuse had such a severe effect on him that he could not know that the taxes were unpaid (A 27).

As to Landau, the Court of Appeals held:

> "...To permit the CEO and owner of a company, the person with the ultimate authority over the company's financial affairs, to escape liability by claiming that he or she was so addicted to cocaine and alcohol as to lack significant control in fact would defeat the purpose of the statute. This is particularly true on the facts of this case, where throughout the Tax Period Landau continued to act as CEO and to draw down a salary of over a half a million dollars, while exposing his subordinates (who earned

> much less) to a personal liability for the withheld taxes in an amount of over $1 million.
>
> Similarly, we hold that an individual's drug addiction does not preclude a finding that an individual wilfully failed to remit the withholding taxes, at least where that individual is the CEO and owner of the company..." (A 26).

The Second Circuit further held that even if Landau's addiction prevented him from exercising his authority, or understanding that the taxes were due, his addiction did not justify or excuse his failure to remit the taxes because, unlike physical illness, addiction flowed from a voluntary decision to use narcotics and alcohol (A 27).

The Court of Appeals noted that although it reached the same results as had the District Court, it found some of the District Court's reasoning to be "troubling," in particular the District Court's analogy to criminal law. Accordingly, the Court of Appeals:

> "decline[d] to muddy the waters by importing any criminal notions of specific or general intent into § 6672 for the purpose of determining whether the defense of voluntary intoxication is available under § 6672. We simply hold, as a matter of policy, that it is not." (A 27)

The Court of Appeals specifically based its ruling, as to Landau, on notions of policy (A 27). Indeed, the Court of Appeals did not cite any cases directly on point, expressly finding that, as to Landau's defense that he was incapacitated by his drug and alcohol addiction, so as to not be a responsible person, "this issue does not appear to have been addressed in the context of §6672", 155 F. 3d 93, 106 (A 26), but noting that:

> "in analogous bankruptcy cases, courts have refused to recognize drug addiction as a defense to liability. See e.g., In re Berzon, 145 B.R. 247, 251 (Bankr. N.D. Ill. 1992) (holding that debtor's cocaine habit did not preclude a finding that he willfully failed to file tax returns); In re Correa, 58 B.R. 88 (Bankr. N.D. Ill.1986) (holding that debtor's failure to attend creditors' meeting and failure to disclose certain information constituted a willful failure to abide by court orders despite cocaine addiction)", 155 F. 3d at 106 (A 26).

The Court of Appeals declined to rule, as specifically requested by the Government's Brief on Appeal, that the verdict as to Landau was against the weight of the evidence.

By Order dated November 19, 1998, the Second Circuit denied rehearing and in banc review of the panel's decision (A 38).

CONSIDERATIONS MAKING THIS CASE WORTHY OF CERTIORARI

In Slodov v. United States, 436 U.S. 238, 98 S. Ct. 1778, 56 L. Ed. 2d 251 (1978), this Court held that 26 U.S.C. § 6672:

> "...was not intended to impose liability without personal fault. Congress, moreover, has not made corporate officers personally liable for the corporation's tax obligations generally, and § 6672 therefore should be construed in a way which respects that policy choice." 436 U.S. at 254, 98 S. Ct. at 1788.

Petitioner submits that the decision of the Second Circuit, as to Petitioner, relying upon Petitioner's status as sole shareholder and salaried CEO, to bar his defense as a matter of law on grounds of "policy", conflicts with the above quoted precedent of this Court in Slodov.

No other circuit appears to have considered the precise issue at bar, to wit, whether consideration of the effects of drug and alcohol addiction is barred as a matter of law on the grounds of policy in determining whether one is a "responsible" person under IRC § 6672, United States v. Landau, 155 F. 3d at 106 (A 26). The Circuit Courts which have considered § 6672, as well as this Court, held that the issue of whether one is a "responsible person" is a question of fact which requires consideration of the totality of the circumstances, and, until Petitioner's case, did not exclude consideration of any relevant circumstances, as a matter of law, or based on public policy (or for any other reason). The decision of the Second Circuit thereby creates a conflict between the Second Circuit and all other Circuits which have considered the issue, as well as with this Court's opinion in Slodov v. United States, supra.

In addition, Petitioner submits that the decision of the

Second Circuit herein sub silentio modified, if not reversed, prior Second Circuit precedent directly on point, such as United States v. Rem, 38 F. 3d 634 (2d Cir. 1994). This precedent was in conformity with that of other circuits in considering the totality of the circumstances, without exception as a matter of law or public policy, in determining whether one was a "responsible person" under IRC § 6672.

Petitioner respectfully submits that certiorari should be granted: (a) in view of the Second Circuit's deviation from this Court's precedent in Slodov v. United States, supra; (b) to resolve a conflict among the circuits; (c) in view of the overwhelming importance of a uniform national interpretation of a federal tax statute, IRC § 6672; and (d) in that the decision of the Second Circuit herein has so far departed from the accepted and usual course of judicial proceedings as to warrant exercise of this Court's supervisory power. Moreover, this Court has previously granted certiorari to review decisions of the Courts of Appeals regarding the trust fund provisions of the Internal Revenue Code. Slodov v. United States, supra; United States v. Energy Resources Co., Inc., 495 U.S. 545, 110 S. Ct. 2139, 109 L. Ed. 2d 580 (1990), Begier v. Internal Revenue Service, 496 U.S. 53, 110 S. Ct. 2258, 110 L. Ed. 2d 46 (1990); United States v. A & B Heating & Air Conditioning, Inc., 486 U.S. 1002, 108 S. Ct. 1724, 100 L. Ed. 2d 189 (1988); United States v. Sotelo, 436 U.S. 268, 98 S. Ct. 1795, 56 L. Ed. 2d 275 (1978), reh'd denied, 438 U.S. 907, 98 S. Ct. 3126.

Additionally, Petitioner believes that this case would provide an excellent opportunity for the voice of this Court to be heard as to whether the effects of drug and alcohol addiction on an individual constitute an issue of fact, or whether such effects should be deemed irrelevant as a matter of law under the Internal Revenue Code.

Moreover, as held by four Justices of this Court, in dissent, in a prior case involving § 6672:

"The Government undoubtedly needs the revenues it receives from taxes, but great as that need may be I cannot join the Court's thrice-twisted analysis of this particular statute to gratify it." United States v. Sotelo, 436 U.S. 268, 282, 98 S. Ct. 1795, 1803, 56 L. Ed. 2d 275 (1978) (dissent of Mr. Justice Rhenquist, with whom Justices Brennan, Stewart and Stevens joined).

POINT I

IRC § 6672 REQUIRES CONSIDERATION OF THE TOTALITY OF THE CIRCUMSTANCES TO DETERMINE WHETHER ONE IS A "RESPONSIBLE PERSON"

Numerous decisions interpreting 26 U.S.C. § 6672, including those from the Second Circuit (prior to the case at bar) and other circuits, have found that the determination of whether one is a "responsible person" thereunder is a question of fact, as to which the court is required to consider the totality of the relevant circumstances, without any exceptions engrafted as a matter of law or public policy.

This Court has stated the rule, in interpreting § 6672:

"Sections 6672 and 7202 were designed to assure compliance by the employer with its obligations to withhold and pay the sums withheld, by subjecting the employer's officials responsible for the employer's decisions regarding withholding and payment to civil and criminal penalties for the employer's delinquency". Slodov v. United States, 436 U.S. 238, 247, 98 S. Ct. 1778, 1785 (emphasis added).

***

We conclude therefore that the phrase '[a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title' was meant to limit § 6672 to persons responsible for collection of third-party taxes...". Slodov v. United States, id, 436 U.S. 238, 250, 98 S. Ct. 1778, 1787 (emphasis added).

The various circuits have re-stated the rule as follows:

"The key to liability under section 6672 is the power to control the decision-making process by which the employer corporation allocates funds to other creditors in preference to its withholding tax obligations." Bowlen v. United States, 956 F. 2d 723, 728 (7th Cir. 1992).

"The key element [to liability under § 6672] is whether that person has the statutorily imposed duty to make the tax payments." O'Connor v. United States, 956 F. 2d 48, 51 (4th Cir. 1992).

"The crucial examination is whether a person had the 'effective power to pay taxes'." Purcell v. United States, 1 F. 3d 932, 937 (9th Cir. 1993), quoting Raba v. United States, 977 F. 2d 941, 943 (5th Cir. 1992)

"...the test for determining the responsibility of a person under § 6672 is essentially a functional one, focusing upon the degree of influence and control which the person exercised over the financial affairs of the corporation and, specifically, disbursements of funds and the priority of payments to creditors." Gephard v. United States, 818 F. 2d 469, 473 (6th Cir. 1987).

...where appellant had no knowledge of his failure to pay

> the tax imposed upon his corporation by 26 U.S.C. §§ 3102 and 3402 until such time as he no longer had significant control over the corporation or the final word as to what bills should be paid, he is not personally liable for payment under 26 U.S.C. § 6672. Dudley v. United States, 428 F. 2d 1196, 1202 (9th Cir. 1970), rev'g and rem'dg, 285 F. Supp. 979 (N. D. Cal. 1967).

Under the rule of Slodov and its progeny, the specific factors enumerated, considered as part of the totality of the circumstances, include whether the person sought to be held individually responsible for non-payment of withheld taxes:

> 1. is an officer or member of the board of directors of the corporation; 2. owns shares or possesses an entrepreneurial stake in the company; 3. is active in the management of the day to day affairs of the company; 4. has the ability to hire and fire company employees; 5. makes decisions regarding which, when and in what order outstanding corporate debts or taxes will be paid; 6. exercises control over daily bank accounts and disbursement records; and 7. has check signing authority. United States v. Landau, 155 F. 3d 93, 100-101 (2d Cir. 1998) (A 15); United States v. Rem, 38 F. 3d 634, 642 (2d Cir. 1994); Fiataruolo v. United States, 8 F. 3d 930, 939 (2d Cir. 1993); Hochstein v. United States, 900 F. 2d 543, 547 (2d Cir. 1990), cert. denied, 504 U.S. 985, 112 S. Ct. 2967, 119 L. Ed. 2d 587 (1992).

Other circuits have enumerated similar factors. Raba v. United States, 977 F. 2d 941, 943 (5th Cir. 1992); Gephard v. United States, 818 F. 2d 469, 473 (6th Cir. 1987). No single factor is controlling. Rizzuto v. United States, 889 F. Supp 698, 704 (S.D.N.Y. 1995).

It is apparent that each of the above factors constitutes a factual issue, appropriate for determination by the jury, as trier of the facts. It is further apparent the reason or motive behind the individual's status under any of those factors, as opposed to the factors and status themselves, is not determinative, with but a single exception not relevant herein[5]. Nor has any relevant factor been barred from consideration on grounds of public policy, prior to the instant case.

None of the cases required that relevant facts be subject to a public policy analysis to determine whether they were worthy of consideration by the trier of facts. Rather, so long as a fact was relevant and material to the issue of whether the individual was responsible for payment of the corporation's taxes and, if found responsible, acted wilfully in failing to pay over taxes, the fact was properly considered by the trier of fact.

The same rule should have been applied to Petitioner, so as to allow the jury to consider the effects of his drug and alcohol addictions upon Petitioner's ability to be a "responsible person" under IRC § 6672, and his ability to act wilfully in failing to pay taxes. Petitioner does not argue that "voluntary intoxication", in and of itself, constitutes a defense. Petitioner asks only that the Court be allowed to consider the effects of his addiction, along with all other relevant facts, upon the statutory predicates for liability under § 6672.

Prior to the instant case, the Second Circuit's rulings were

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[5]The only exception is where an otherwise responsible person deliberately withdraws from certain of the relevant factors to avoid being designated as a responsible person. Raba v. U.S., 977 F. 2d 941, 945 (5th Cir. 1992); Fiataruolo v. United States, 8 F. 3d 930, 939 (2d Cir. 1993). At bar, the Government did not contend that Landau became addicted to drugs and alcohol or withdrew from responsibilities at RLA in order to avoid responsible person liability.

in conformity with those of the other circuits quoted above, and were also in conformity with this Court's holding in Slodov v. United States, supra; United States v. Rem, 38 F. 3d 634 (2d Cir. 1994); Fiataruolo v. United States, 8 F. 3d 930 (2d Cir. 1993); Hochstein v. United States, 900 F. 2d 543 (2d Cir. 1990), cert. denied, 504 U.S. 985, 112 S. Ct. 2967, 119 L. Ed. 2d 587 (1992).

In a thoughtful analysis, one Second Circuit Judge noted:

"While it is true that § 6672 concerns itself with the important goal of protecting trust funds owed to the United States by providing alternate sources from which to collect unremitted taxes owed by a corporation on account of its employers, Congress refrained from imposing liability on all available targets. It did not, for example, impose liability on all officers, directors and stockholders of the delinquent corporation; it limited the liability to those persons in the corporation who bore responsibility for seeing to it that the tax payments were made...

In defining the standards for determining who falls within this statutory definition, courts developed the term 'responsible persons' and concluded that their identification depends on whether they exercised 'significant control' over the corporation's finances. (Citations omitted.) The point of the 'significant control' inquiry is to determine whether the individual effectively exercised (or participated in the exercise of) sufficient power to cause the delinquent taxes to be paid, but failed to do so, using the Government's money instead for other purposes." (Citation omitted).

***

> The 'core question' is 'significant control'. (Citation omitted). The power to sign checks and the holding of corporate office are indeed factors that courts have listed as helpful in deciding whether an individual possessed the necessary power, but they are only factors. Either can exist in circumstances where the individual in reality does not possess significant control over corporate finances. When this is so, the potentially devastating 'responsible person' liability should not be imposed. Neither, however, may a person who truly participates in the exercise of that decisionmaking power hide behind technicalities to avoid responsibility." United States v. Rem, 38 F. 3d 634, 646-647 (2d Cir. 1994). (Concurring Opinion of Judge Leval)

The decision in Rem is in accord with decisions in other Circuits, which tie the concept of "responsible person" to "effective control". (See p. 15 infra.)

The Second Circuit's ruling at bar, as to which certiorari is sought, is erroneous in several distinct ways:

(a) The rule announced herein by the Second Circuit makes determinative one's status as the sole shareholder and salaried chief executive officer of a corporation, so as to outweigh all other factors, including those heretofore specifically enumerated as being relevant in determining § 6672 liability. Such rule is directly contrary to this Court's holding in Slodov v. United States, supra, that:

> "Congress...has not made corporate officers personally liable for the corporation's tax obligations generally, and § 6672 therefore should be construed in a way which respects that policy choice." 436 U.S. 238, 254, 98 S. Ct. 1778, 1788.

(b) The Second Circuit's ruling sub silentio

modifies the well settled rule requiring that the Court consider the totality of the circumstances, by prohibiting the individual from raising any factual issue relating to the effects of alcohol or drug addiction.

(c) The ruling, as to Petitioner, is expressly based on policy, when no such policy has been previously found to exist regarding § 6672, and is contrary to that policy which this Court has found in Slodov v. United States "to limit § 6672 to persons responsible for collection of third-party taxes." 436 U.S. at 250, 98 S. Ct. at 1787.

Petitioner respectfully submits that the Second Circuit's ruling introduces a perilous concept to the heretofore clear rule under § 6672. Previously, the Court had only to weigh the relevant facts. Under the Second Circuit's ruling at bar, the Court will now be required to determine whether exculpatory evidence, such as the effects of drug or alcohol addiction upon the individual sought to be held liable, satisfies a test of public policy, so as to entitle the relevant fact to be considered in a case under § 6672.

Petitioner argues that an analysis of public policy grounds as to each factor relied upon by an individual seeking to avoid § 6672 liability will unduly complicate cases and lead to great uncertainty in the law. While it may be popular to hold drug and alcohol addiction by a salaried CEO and sole shareholder to be against public policy, no such public policy appears on the face of the statute or in the legislative history regarding § 6672. To the contrary, this Court has found that § 6672 should be interpreted so as to respect Congress' policy choice not to make corporate officers personally liable for the corporation's tax obligations generally. Slodov v. United States, supra, 436 U.S. 238, 254, 98 S. Ct. 1778, 1788. The Second Circuit's opinion at bar disregards the previously announced policy which this and other courts have held should be respected, and substitutes new policy at variance with the long established holdings.

Under public policy as newly announced by the Second Circuit herein, many other potential factors are harder to categorize, and the new "Policy" rule will prove difficult to apply. For example, one may be disabled by a disease caused by long-term drug addiction or alcoholism. Had Petitioner been hospitalized with cirrhosis of the liver during the Tax Periods, should evidence of such illness, perhaps causing him to have been unable to devote any attention to his business affairs, have been barred, as a matter of law and public policy? What about the sole shareholder who becomes mentally and/or physically disabled from a self-inflicted gunshot wound from an illegal firearm? The permutations are endless, as will be the uncertainty necessarily arising from a rule which invokes, as its rationale, public policy, and requires consideration of not just facts, but also a sometimes fluid policy, to determine whether those facts are worthy of consideration by the fact-finder. See Point III, infra.

Petitioner's research has failed to uncover any case holding that facts demonstrating that the individual sought to be held personally liable for a corporation which failed to pay over its withholding taxes, could not be considered in determining whether that individual was a responsible person under § 6672, if those facts related to that individual's addiction to narcotics and/or alcohol, or otherwise were unworthy of consideration for reasons of policy. Rather, the cases under § 6672 specifically allow consideration of a person's physical and mental status in determining whether that individual should be deemed a "responsible person" under IRC § 6672. In Young v. United States, 609 F. Supp. 512 (N.D. Texas 1985), the Court held:

> "Viewing the facts here in the light most favorable to the Youngs, a serious question arises as to whether G.G. Young was a responsible person in 1979. The degree to which his illness affected his ability to understand and participate in the affairs of the corporation during 1979 is

> a factor which this court is unable to resolve on the basis of the summary judgment evidence...". 609 F. Supp. at 518.

In Sherwood v. United States, 246 F. Supp. 502 (E.D.N.Y. 1965) the Court held that an individual was not a responsible person during a specific time period, as the result of his "being incapacitated by illness on and after June 7, 1957 to the date of his discharge on July 3rd, 1957, during which time [another individual] acted in his place and stead." 246 F. Supp. 502, 507.

And, in a Bankruptcy Court case, the Court accepted that physical incapacity could be a defense to liability under IRC § 6672, but found a failure to prove incapacity, holding:

> "From the testimony of the parties, this court must come to the conclusion that although Keith may have been harassed by his creditors and besieged by declining health, his competence was not abated except perhaps in the rare instances which immediately preceded surgery and a reasonable post-operative recovery period. Otherwise, his capability remained uninterrupted." In re John William Keith, Jr., 1978 WL 1160 (E.D. VA, Richmond Division Bankruptcy No. BK-76-1342-R, 2/21/78.)

The Second Circuit opinion at bar cited two Bankruptcy Court cases, both decided by the same Bankruptcy Judge, as refusing to recognize drug addiction as a defense to liability under other statutes (A 26). However, both In re Berzon, 145 B.R. 247 (Bankr. N.D. Ill. 1992)[6] and In re Correa, 58 B.R. 88 (Bankr. N.D. Ill. 1986) involved obligations which are universal, totally unlike

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[6]The Court in Berzon relied strongly upon its own opinion in Correa. 145 B.R. 247, 251.

personal liability for unpaid corporate withholding taxes, which is imposed only on "responsible persons." Everyone meeting certain income standards is required to file a tax return timely and truthfully (the obligations at issue in Berzon), and everyone who files a petition in bankruptcy is required to attend creditors' meetings and provide certain financial information (the obligation at issue in Correa). By contrast, not everyone - not even every officer, sole shareholder and CEO - is personally responsible for paying over withholding taxes. Rather, Congress has explicitly required that only those persons who are found to have been responsible may be held liable under IRC § 6672. Slodov v. United States, 436 U.S. 238, 250, 98 S. Ct. 1778, 1787 (1978). Congress chose not to legislate general liability for corporate officers and "§ 6672 should therefore be construed in a way which respects that policy choice." Id, 436 U.S. at 254, 98 S. Ct. at 1788.

There are other distinctions between the facts at bar and those in Berzon and Correa, supra. In Berzon, there was proof that Berzon had wilfully attempted to evade taxes, by depositing paychecks into his girlfriend's checking account, filing tax returns two to five years late, and understating his income on the returns belatedly filed. In Correa, the Court found "no persuasive statement or evidence in the record...that his cocaine addiction and the other excuses he offered confronted him with circumstances beyond his control." 55 B.R. 88, at 90.

In contrast, Landau's jury found him not to have been a responsible person for payment of withheld taxes (A 10), a finding which was at least supported, if not compelled, by the evidence adduced at trial. This finding was expressly assumed by the District Court to have been supported by the evidence, United States v. Landau, 956 F. Supp. 1160 (S.D.N.Y. 1997) (A 30), and the Court of Appeals declined the Government's request to set aside the verdict as against the weight of the evidence. In view of this undisturbed factual finding, reliance on Correa and Berzon

to bar consideration of the effects of drug and alcohol addiction is misplaced.

Had Congress so desired, it might have imposed universal liability on all sole shareholders and CEOs under § 6672 without qualification, or, provided only that the shareholder exceeded a threshold salary amount. But Congress chose not to do so. Similarly, Congress, in its wisdom, might have legislated that the effects of drug and alcohol addiction could not be considered in determining liability under § 6672. However, despite the numerous laws, both criminal and civil, concerning drug use, Congress did not enact any statute barring consideration of the effects of drug addiction in deciding whether one is a "responsible person" under § 6672. Nor has the Internal Revenue Service adopted any regulation governing this matter. Petitioner submits that it was therefore error for the Second Circuit to have barred, as a matter of law, on grounds of policy, evidence of the effects of drug and alcohol addiction proving that Petitioner was not a "responsible person" under § 6672.

POINT II

THE RULING OF THE SECOND CIRCUIT, BARRING FROM CONSIDERATION AS A MATTER OF LAW THAT PETITIONER WAS NOT A RESPONSIBLE PERSON AS A RESULT OF THE EFFECTS OF HIS ADDICTIONS, CONFLICTS WITH THE ESTABLISHED RULE THAT LIABILITY UNDER IRC § 6672 REQUIRES CONSIDERATION OF THE TOTALITY OF THE CIRCUMSTANCES

The holding of the Second Circuit at bar - that the effects of Petitioner's drug and alcohol addiction, with regard to trust funds which should have been paid by RLA, could not properly be considered by the jury - creates a direct conflict with the rule in

the Fourth, Fifth, Sixth, Seventh and Ninth Circuits (see p. 15 infra), as well as the rule which existed in the Second Circuit prior to the case at bar (see p. 17 infra), and that enunciated by this Court in Slodov v. United States, supra, which mandated consideration of all relevant circumstances under § 6672.

In the case at bar, the Second Circuit held:

> "To permit the CEO and owner of a company, the person with the ultimate authority over the company's financial affairs, to escape liability by claiming that he or she was so addicted to cocaine and alcohol as to lack significant control in fact would defeat the purpose of the statute [§ 6672]. This is particularly true of the facts in this case, where throughout the Tax Period Landau continued to act as CEO and to draw down a salary of over half a million dollars, while exposing his subordinates (who earned much less) to a personal liability for the withheld taxes in amounts of over $1 million.
>
> Similarly, we hold that an individual's drug addiction does not preclude a finding that an individual wilfully failed to remit the withholding taxes, at least where that individual is the CEO and owner of the company." United States v. Landau, 155 F. 3d 93, 106 (A 26).

No case has previously held that the individual's corporate status as salaried "CEO and owner of the company" should be determinative under § 6672. Id. Rather, all prior cases, from every circuit to have considered the issue, as well as this Court's opinion in Slodov, held that § 6672 liability must be based on the totality of the circumstances. No case has held that certain matters should be excluded as a matter of law, or on policy grounds.

Moreover, the Court of Appeals erred in focusing on Landau's salary from RLA. The evidence showed that during the Tax Periods, Landau borrowed $2.3 million for RLA, secured by Landau's homes and shares of RLA, and also sold other personal assets to raise money for RLA (A 6). Landau's salary, while significant as an absolute number, was only a minor fraction of that which he borrowed from a bank and raised by sale of personal assets to invest in the company during the Tax Periods, and which he lost eight months later, when RLA became bankrupt. The significance of Landau's salary,[7] when the funds to pay that salary had been invested by Landau himself so as to enable a salary to be paid, properly raised fact questions for the jury, and not a matter of law in those circumstances.[8]

POINT III

THE COURT OF APPEALS ERRED IN HOLDING, AS A MATTER OF POLICY, THAT THE EFFECTS OF DRUG AND ALCOHOL ADDICTION CANNOT BE CONSIDERED UNDER § 6672

The Court of Appeals explicitly made its ruling as "a matter of policy", that the effects of drug and alcohol addiction is not a defense under IRC § 6672, United States v. Landau, 155 F. 3d 93, 107 (A 27).

No such policy regarding the effects of drug or alcohol

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[7]As the Tax Periods consisted of three quarters (A 5), the amount of salary actually received by Petitioner during the Tax Periods was less than a year's salary.

[8]Had Landau refrained from investing the money so as to permit him to draw a salary, he surely would have been better off (Tr. 470).

addiction appears any place in IRC § 6672 or its legislative history. _To the contrary, there exist numerous federal statutes explicitly penalizing, both criminally and civilly, the use of illegal drugs. But Landau was not prosecuted under any of these statutes. IRC § 6672 requires only consideration of whether Landau was a "responsible person" for collecting and paying over withholding tax, and whether he wilfully failed to do so - not whether any circumstances, such as the effects of addiction, showing that he was not responsible, should be barred from consideration on grounds of public policy.

Numerous cases, from both the various Courts of Appeals and this Court, declined invitations to use "policy" as a justification for their decisions, particularly in the area of taxation.

As stated by the Seventh Circuit:

> "If the position of the respondent is sustained, and the attorneys' fees and expenses disallowed as a deduction in the instant case, then no business expense of an illegal business is deductible, and such business will be taxable on its gross income. Congress has not said that that discrimination shall be made. Neither has the Department had the hardihood to make such a material change by way of its regulations. If this change is to be made and the policy altered, let Congress do it." Heininger v. Commissioner, 133 F. 2d 567, 570 (7th Cir. 1943), aff'd, 320 U.S. 467, 64 S. Ct. 249 (1943).

The Fifth Circuit has held:

> "If the tax collector is required to sit in judgment on the morals of his clients, he will be doing something for which he has neither the training nor the knowledge and he will be adding to already heavy administrative burdens.

> Furthermore, uneven and discriminatory applications of the tax laws will result. There are too many different types and degrees of wickedness, and there are too many different attitudes toward sin on the part of tax officials and judges." Dixie Machine Welding & Machine Works, Inc. v. United States, 315 F. 2d 439, 440 (5th Cir. 1963).

The policy of not allowing the effects of drug and alcohol addiction to defeat liability under § 6672 might be commendable. However, it is not for the courts to make such policy, but for the legislature to do so, should it so desire. Building Service Employees International Union v. Gazzam, 339 U.S. 532, 70 S. Ct. 784, 94 L. Ed. 1045 (1950), reh'd denied, 339 U.S. 991, 70 S. Ct. 1019. Until Congress acts, the courts must be bound by the policy long held to govern § 6672, that not all corporate officers or shareholders are liable under § 6672, but only those found on a factual determination to be "responsible persons" for the collection and payment of withheld taxes. So long as the jury's verdict was supported by the evidence - as was unquestionably the case with Petitioner - the Court should not use "policy" as a crutch to override the jury's verdict.

At bar, the Court of Appeals cited only two Bankruptcy Court cases dealing with addiction (A 26), In re Correa, supra and In re Berzon, supra. Neither of those cases dealt with 26 U.S.C. § 6672. Moreover, both of those cases were decided by the same Bankruptcy Judge. "Policy" should not be set by the Court of Appeals, based on two decisions from a single Bankruptcy Judge, not involving even the same title of the United States Code, let alone the same section of the law, as is at issue in the instant case.

The Court's function - particularly here, in the light of the clear legislative history declining to cast a broad net, but rather, limiting liability under § 6672 to those in fact (and not merely in title) found responsible for collection and payment of withholding taxes - should be to defer to the policy announced by Congress

and recognized by this Court in Slodov v. United States, supra. No proper grounds existed for the Court of Appeals to announce a new policy, particularly where such new policy conflicts with existing legislative intent, as enacted by Congress and recognized by this Court.

Petitioner respectfully submits that the ruling of the Court of Appeals herein - explicitly based on consideration of public policy - is of such significance and is contrary to the expressed views of this Court in Slodov v. United States, supra, and other circuits interpreting § 6672 - none of which determined any case on grounds of the policy articulated for the first time by the Second Circuit at bar - as to warrant certiorari to review the ruling of the Second Circuit herein.

CONCLUSION

Certiorari should be granted to review the decision and order of the Second Circuit as to Petitioner Robert Landau.

Dated: New York, New York
February 11, 1999

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT

Argued: February 26, 1998 Decided: August 25, 1998

Docket No. 97-6139

UNITED STATES OF AMERICA,
Third-Party Plaintiff-Appellee,
v.
ROBERT LANDAU,
Third-Party Defendant-Appellant,
NATHAN UNGER,
Plaintiff.

Docket No. 97-6165

NATHAN UNGER
Plaintiff-Appellee,
v.
ROBERT LANDAU
Third-Party-Defendant,
UNITED STATES OF AMERICA,
Defendant-Appellant.

BEFORE: WINTER, Chief Judge, PARKER, Circuit Judge, and SCHWARZER, District Judge[1]

Defendant-appellant United States of America (the "Government") appeals from a judgment of the United States District

[1]The Honorable William W. Schwarzer, Senior Judge of the United States District Court for the Northern District of California, sitting by designation.

Court for the Southern District of New York (Whitman Knapp, Senior Judge) entered May 7, 1997, setting aside a jury verdict against plaintiff-appellee Nathan Unger and sua sponte granting Unger judgment as a matter of law, dismissing the Government's counterclaims and directing the Internal Revenue Service ("IRS") to pay Unger $21,000 plus interest. Third-Party defendant-appellant Robert Landau appeals from the judgment of the United States District Court for the Southern District of New York (Whitman Knapp, Senior Judge) entered April 4, 1997, setting aside a jury verdict in favor of Landau, granting the Government's motion for judgment as a matter of law as against Landau, and awarding the Government judgment against Landau in the sum of $1,046,376.30 plus statutory interest and additions accruing from November 23, 1987.

We reverse the decision of the district court with respect to Nathan Unger and remand the case to rule on Unger's motion for a new trial. We affirm the decision of the district court with respect to Robert Landau.

Jerome Kamerman, New York, NY (Kamerman & Soniker P.C., New York, NY, Michael J. Gerstein, New York, NY, of counsel), for Third-Party-Defendant-Appellant Landau in No. 97-6139 and for Third-Party Defendant Landau in No. 97-6165.

Jeffrey Oestericher, Assistant United States Attorney, New York, NY, (Mary Jo White, United States Attorney for the Southern District of New York, Gideon A. Schor, Assistant United States Attorney, New York, NY, of counsel), for Third-Party-Plaintiff-Appellee United States of America in No. 97-6139 and for Defendant-Appellant United States of America in No. 97-6165

Wallace Musoff, New York, NY
(Michael J. Coyle, Law Offices of Wallace Musoff, New York, NY, of counsel), for Plaintiff Unger in
No. 97-6139 and for Plaintiff-Appellee Unger in No. 97-6165.

PARKER, Circuit Judge:

This appeal concerns the assessment of tax penalties against Nathan Unger and Robert Landau under 26 U.S.C. §6672 for the failure of their former employer, Robert Landau Associates ("RLA"), to remit withholding and Federal Insurance Contributions Act ("FICA") taxes to the Untied States Internal Revenue Service ("IRS" or Government") as required under 26 U.S.C. §7501(a). In 1987, the IRS made separate penalty assessments against Unger and Landau, and seized all of Unger's available assets. Unger brought an action seeking a refund; the IRS counterclaimed for the unpaid assessment and commenced a third-party action against Landau. The case was tried before a jury in the United States District Court for the Southern District of New York (Whitman Knapp, Senior Judge), and the jury found Unger, but not Landau, personally liable for the unremitted taxes. Unger moved for a new trial and the Government moved for a judgment as a matter of a law against Landau. The

district court also set aside the jury verdict against Unger, sua sponte granted Unger judgment as a matter of law and directed the IRS to pay Unger $21,000 plus interest. The district court also set aside the jury verdict in Landau's favor, granting the Government's motion for judgment as a matter of law, and awarded the Government judgment against Landau in the sum of $1,046,376.30 plus statutory interest and additions accruing from the date of the assessment of the penalty. For the reasons stated below, we reverse and remand the judgment of the district court with respect to Unger, and affirm the judgment of the district court with respect to Landau.

I. Background

A. Unger's and Landau's Duties at RLA

RLA, founded by Landau in 1975, was a marketing and advertising agency that provided promotional and sports licensing services to corporate clients. During the first three quarters of 1984 (the "Tax Period"), Landau was RLA's sole shareholder, President and Chief Executive Officer ("CEO") and Unger was Senior Vice President and Chief Financial Officer ("CFO"). Landau's salary was approximately $600,000 and Unger's was $100,000. During the Tax Period, RLA employed approximately two hundred people. Although primarily responsible for creative marketing and sales, Landau had supervisory authority over all RLA employees, including Unger.

Unger was first hired by RLA in March 1978 at the age of 22. He had a bachelor's degree in accounting from Queens College, but has never been a certified public accountant. He has never owned any shares in RLA. Unger's first position at RLA was as an assistant to the Controller. In January 1979, Unger was promoted to Controller, a position he held for approximately two years. He reported directly to Landau and was responsible for maintaining the company's books and supervising a staff of 4-5 employees. In this position, he had the power to hire and fire employees in his department. Between 1981 and 1983, Unger served as Vice

President of Marketing Services. Unger was promoted to Senior Vice President and CFO in late 1983. He remained in that position until RLA declared bankruptcy on September 14, 1984.

As CFO, Unger was responsible for RLA's accounting and administrative functions and he reported directly to Landau. He signed documents with the title "Senior Vice-President." Unger had check-signing authority over all of RLA's accounts and signed checks to pay RLA's payroll, commercial creditors and withholding taxes. He had the authority to make transfers from RLA's bank accounts and was one of three people, including Landau, authorized to sign any and all documents without limitation, including leases, any financially related documents or any agreements with vendors or suppliers with total commitments in excess of $10,000.

Unger's claim, at trial and on appeal, is that his actual authority did not extend to the full extent of his technical authority. Unger became aware, in the beginning of 1984, that RLA was experiencing cash flow problems and was unable to pay all of its bills. During 1984, Unger spent most of his time talking with creditors and vendors regarding demands for payment. Unger was also aware that RLA was not meeting its withholding tax obligations, and he was informed by RLA's outside auditing firm that he could be personally liable for the unpaid taxes. Unger maintains that he would draw up a list of creditors on a weekly basis and present the list to Landau. The tax delinquencies were at the top of the list. However, Unger claims that Landau directed him to pay other creditors first, and Landau assured him that he would soon obtain enough new business to enable RLA to pay off its tax liabilities. Unger followed Landau's instructions.

On April 26, 1984, RLA filed its Employer's Quarterly Federal Income Tax Return on Form 941 ("941 Return") for the first quarter of 1984 showing a total amount due for that period of $568,340.17 for withheld income and FICA taxes. RLA paid $101,711.58. On July 26, 1984, RLA filed its 941 Return for the second quarter of 1984 showing withholding taxes due for the period in the amount of $490,251.47, none of which was paid. In November 1984, RLA filed its 941 Return for the third quarter of 1984 showing

withholding taxes due for the period in the amount of $289,242,33. The total amount of the delinquency was $1,046,376.30.

B. Landau's Drug and Alcohol Addiction and His Activities during the Tax Period

By the spring of 1983, Landau had become totally addicted to cocaine. Shortly thereafter, Unger was promoted to CFO and Landau gave Unger power of attorney so that Unger could write checks on Landau's personal bank account in order to pay Landau's personal bills. In December 1983, Landau began consuming alcohol in addition to the cocaine. In late May 1984, Landau voluntarily entered a drug rehabilitation hospital, but left after a few days with his addiction uncured. He continued to ingest daily six to eight grams of cocaine and ã quart of alcohol. After RLA was declared bankrupt, Landau plead guilty to wire and mail fraud charges.

As CEO, Landau could sign checks, determine the order in which bills would be paid and negotiate contracts. According to the Government, Landau was aware by the end of 1983 that RLA was experiencing cash flow problems. Landau obtained a $2.3 million bank loan in January 1984, which was secured by the assets of RLA and Landau's personal real estate holdings, and subsequently called major clients to inform them of the material change in the company's finances. He also negotiated a termination of a major contract which had caused RLA to suffer substantial losses. In February 1984, Landau took a business trip to Sarajevo to oversee RLA's promotion work at the Winter Olympics taking place there. While in Sarejevo, Landau hosted dinner parties, entertained clients and escorted clients to events. In June 1984, Landau landed a major account as marketing representative for the U.S. Olympic Committee, with exclusive responsibility for licensing commercial use of all Olympic-related symbols and marks through the 1988 games.

Landau was told by at least June or July of 1984 that RLA was delinquent with respect to its withholding tax obligations. Also in July 1984, Landau negotiated the sale of his partnership interest in certain race horses and put the proceeds into RLA. At the end of

July, Landau took a business trip to the Summer Olympics in Los Angeles and tried, unsuccessfully, to raise money.

C. Pre-trial Proceedings

On or about November 23, 1987, the IRS made separate 100% penalty assessments against Unger and Landau each in the amount of $1,046,376.30, based on their alleged failure to cause RLA to remit its withholding taxes to the IRS for the Tax Period . With respect to Unger, the Government actually seized all his available assets totaling $20,500. Unger paid an administrative fee of $500 for filing a claim for a refund, and on or about January 22, 1990, commenced an action against the Government demanding that the penalty assessed against him be abated and that the district court order the Government to refund the monies it had collected from him based on that assessment. On June 20, 1990, the Government answered Unger's complaint and filed a counterclaim requesting judgment for the unpaid balance of the assessment against Unger plus statutory interest accrued thereon. On June 21, 1990, the Government commenced a third-party action against Lamdau to reduce to a judgment the penalty assessment against him plus accrued interest.

In February 1993, the Government moved for summary judgment on its counterclaim against Unger and third-party complaint against Landau, and to dismiss Unger's complaint. On February 17, 1994, the district court granted the Government's motion in full. The court found that Unger was a "responsible person" within the meaning of §6672, and held that Unger's "assertion that he did not subjectively believe that he had the authority to sign checks to the Government without Landau's consent [was], under Hochstein [v. United States, 900 F.2d 543 (2d Cir. 1990)], irrelevant." The district court so held notwithstanding its view that the application of the Hochstein decision in this case was unjust. With respect to Landau, the district court held that Landau was a "responsible person," rejecting the argument that Landau's substance abuse during the Tax Period rendered him unable

to exercise his authority. The court further held that Landau's voluntary intoxication was no defense to § 6672's willfulness requirement.

On or about March 3, 1994, Landau filed a motion for reconsideration of the district court's summary judgment decision, arguing that there was credible evidence to support the conclusion that Landau did not understand what he was doing and therefore did not act willfully. The district court granted the motion on the ground that the court "may have erred in [its] conclusion that [its] own interpretation of the medical evidence... is the only possible reasonable interpretation."[2]

On or about February 26, 1996, Unger moved to vacate the district court's February 17, 1994 order granting the Government's motion for summary judgment against Unger in light of the intervening decision by this Court in United States v. Rem, 38 F. 3d 634 (2d Cir. 1994). On May 14, 1996, the district court granted Unger's motion and denied the Government's motion for summary judgment against Unger. Accordingly, the case proceeded to trial.

C. Jury Trial and Verdict

The trial took place over seven days beginning on December 9, 1996. Landau called seven witnesses to testify: himself, his wife, Eugene Lewis, Landau's close friend and business colleague, and four doctors who had observed Landau during the Tax Period. Unger was the only witness to testify on his behalf, and he did not introduce any exhibits into evidence. The government did not call any witnesses, but submitted a substantial amount of documentary evidence. Briefly stated, the testimony was as follows.

Ross Brower, M.D., Landau's principal treating physician during the Tax Period, testified that during the period Landau was

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[2]The district court also certified certain questions to the Court of Appeals pursuant to 28 U.S.C. §1292 (b), but the Court of Appeals denied leave to pursue an interlocutory appeal on April 19, 1997.

ingesting cocaine, he was paranoid, anxious, "totally out of control of his mood behavior and thinking" and was "not thinking rationally." He also testified that quantities of half a gram of cocaine is sufficient on a daily basis to impair judgment, thinking ability and memory. On cross-examination, however, Dr. Brower conceded that it was consistent with his diagnosis that Landau could have negotiated contracts, attended business meetings and obtained financing during this period. Dr. Brower further testified that Landau had told him of his concern for his business, its cashflow problems and how RLA was going to pay its bills and employees. He was aware that he owed people money and that if he could not pay them, serious consequences would result.

Allen Chodock, M.D., another physician who treated Landau, testified that during 1984 Landau was "rambling" and often incoherent and illogical "in his mannerisms and thought process." Dr. Chodock also testified that he visited RLA and suggested to Unger that it would be in Unger's best interest to find a job elsewhere if Landau could not "kick his habit." Dr. Chodock agreed, however, that when he visited RLA Landau knew he was the boss of the company and acted like he was the boss of the company and did not exhibit bizarre behavior.

Eugene Lewis, RLA's Vice President and Assistant to Landau, testified that Landau would often not come into the office, and when he did, he came in late in jeans and a T-shirt. He would call meetings immediately, appeared chaotic, and forgot what people told him. According to Lewis, Landau did not act as the boss. During the Tax Period, Landau would often give direct instructions that were inappropriate and his subordinates would try to ignore them. Landau testified that he would come into the office at 7 or 8 p.m. and would be presented with a stack of papers which he signed without reading them. Landau also testified that he recalled attending a meeting in June 1984 in which RLA's delinquent tax obligation was discussed, following which he directed RLA's Executive Vice President, Charles Lockwood, and Unger to pay the delinquent taxes.

With respect to Unger, the district judge instructed the jury

that he would only have a defense to liability if he actually believed that his authority extended only to signing those checks Landau directed him to sign, and if that belief was reasonable under the circumstances. As to Landau, the district court informed the jury of Landau's contention that his drug and alcohol addiction prevented him from being able to participate in the decisions of the company and from being aware of the fact that the taxes were not being paid, but instructed them that Landau only had a defense to liability under § 6672 if his addiction meant that "he didn't know and couldn't know what he was doing and had no capacity to remember."

On December 19, 1996, the jury returned a verdict in the Government's favor as to Unger, and against the Government with respect to Landau. Specifically, the jury answered "yes" to the question whether Unger had "significant control" over the corporation's finances to cause the withheld payroll taxes to be paid to the IRS for the first three quarters of 1984. The jury found that Landau was not "able to effectively exercise significant control over the corporation's finances to cause the withheld taxes to be paid" for the first three quarters of 1984." In answer to question of whether Landau "consciously [knew]... that the withheld payroll taxes that were owed to the government had not been remitted," the jury stated "yes" for the third quarter of 1984, and "no" for the first two quarters of 1984.

D. Post-Trial Motions

On or about December 24, 1996, the Government moved for judgment as a matter of law against Landau pursuant to Fed. R. Civ. P. 50(b). On or about January 21, 1997, Unger moved for judgment as a matter of law on the ground that the assessment against him was untimely, or alternatively, for a new trial on the grounds that the jury verdict against him was manifestly against the weight of the evidence and that he was unfairly prejudiced by having his case tried together with Landau's. On March 17, 1997, the district court issued two separate opinions setting aside both jury verdicts, sua sponte granting Unger judgment as a matter of law, and granting the

Government's motion for judgment as a matter of law as against Landau.

E. The March 17, 1994 Decisions of the District Court

In setting aside Unger's jury verdict, the district court analyzed this Court's decision in Rem and the evidence at trial. According to the district court, "the controlling questions in the case...[were]: (1) whether or not Unger— regardless of the plethora of formal documentation — firmly believed that his actual authority was limited to following Landau's orders; and if so (2) was such belief reasonable in all the circumstances." Unger v. United States, 956 F. Supp. 1152, 1156 (S.D.N.Y. 1997). The court found "irrelevant any documents defining Unger's 'technical authority or titular designation.' " Id. Upon reviewing the evidence at trial, the court found that "the entirety of Unger's testimony establish[ed] beyond peradventure that Unger firmly believed that his actual authority was limited to following Landau's orders and that such belief was reasonable." Id. at 1157. The court found no evidence in the record which would "provide a reasonable basis for rejecting that testimony," and accordingly the Rem decision required the jury's verdict to be set aside. The court explained:

> In brief, Unger's testimony convincingly established a prima facie case. After three years of discovery before bringing its motion for summary judgment, during which time it had available to it every bit of documentary evidence that had been in RLA's possession and the ability to interview and/or depose any relevant person who had either worked for or done business with RLA, the Government was not able to come up with a scintilla of evidence that would authorize a jury to reject Unger's testimony. This, coupled with the conclusions resulting from our study of the record, inevitably leads to a finding that the jury's apparent rejection

> of Unger's testimony was based on sheer surmise and conjecture. Accordingly, allowing its verdict to stand would result in manifest injustice.

956 F. Supp. At 1158.

In the court's view, two factors led the jury astray: "(1) the Government's total misunderstanding of the Rem decision, and (2) the fact that Unger was called upon to testify in 1996 concerning events that had occurred in 1984." Id. As to the first, the court restated that Rem held that "documents defining Unger's 'technical authority or titular designation' " were irrelevant. Id. Yet the Government "persistently cross-examined Unger as though each one of the irrelevant documents somehow refuted what he was saying." Id. Second, the district court thought that Unger's evasive responses to the Government's presentation of endless checks that Unger had signed during the Tax Period "might well have persuaded the jury that Unger was either stonewalling or lying." Id. at 1159.

Rather than granting a new trial, as Unger had requested, the district court sua sponte granted a final judgment in the case, to "bring this seemingly interminable litigation to an end." 956 F. Supp. at 1159. In the court's view, the Government had no "unused evidence which might support a just verdict against Unger" so as to justify a new trial. Id.

With respect to Landau, the district court granted the Government's motion pursuant to Rule 50(b) for judgment as a matter of law against Landau on the ground that intoxication cannot as a matter of law be a defense to liability under §6672. See United States v. Landau, 956 F. Supp. 1160, 1162 (S.D.N.Y. 1997). Analogizing to criminal law, and the principle that voluntary intoxication is a defense to specific but not general intent crimes, the court reasoned that "if a civil statute does not require proof of specific intent then voluntary intoxication may not be a valid defense." Id. at 1162. The court below analyzed this Court's precedent on § 6672 and found that "willfulness" under that section requires only that the Government prove that an individual acted

"voluntarily, knowingly, consciously and intentionally, as opposed to accidentally or mistakenly." Id. The Government was not required to prove "bad purpose or evil motive" in failing to collect and pay the taxes. Id. Thus, the district court reasoned, "liability under Section 6672 [does not] require[] a finding of specific intent." Id. Accordingly, the court concluded that Landau's addiction to alcohol and cocaine could not as a matter of law negate the conclusion that he was a responsible person during the Tax Period or that he willfully failed to remit the taxes to the IRS.

The Government and Landau timely appealed.

II. DISCUSSION

A. Standard of Review

We review a district court's grant of a motion for judgment as a matter of law de novo. See United States v. One Parcel of Property Located at 121 Allen Place, Hartford, Conn., 75 F. 3d 118, 121 (2d Cir. 1996). This Court has held:

> In ruling on a motion for judgment n.o.v. [now judgment as a matter of law under Fed. R. Civ. P. 50 (b)], the district court is required to consider the evidence in the light most favorable to the party against whom the motion was made and to give that party the benefit of all reasonable interferences that the jury might have drawn in his favor from the evidence. The court cannot assess the weight of conflicting evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury.

Smith v. Lightning Bolt Productions, Inc., 861 F. 2d 363, 367 (2d Cir. 1988) (quotation marks and citations omitted); see LeBlanc-Sternberg v. Fletcher, 67 F. 3d 412, 429 (2d Cir. 1995). The district court may properly grant the motion "[o]nly if there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and

conjecture, or such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against [the moving party]." LeBlanc, 67 F. 3d at 429 (quotation marks omitted). "The same standard governs appellate review of a decision granting or denying judgment as a matter of law." Id.

B. The Requirements of Section 6672

Section 6672 provides, in relevant part:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672 (a). "It is well established that the statute requires two elements to be present before personal liability for unpaid withholding taxes attaches: first, the individual must be a person responsible for the collection and payment of withholding taxes, i.e., he must have the authority to direct the payment of corporate funds; second, the individual's failure to comply with the statute must be willful." Hochstein, 900 F. 2d at 546.

"More than one individual may be a responsible person within the meaning of § 6672 (a)." Rem, 38 F.3d at 642. See also Fiataruolo v. United States, 8 F.3d 930, 939 (2d Cir. 1993). The test for whether an individual is a responsible person turns on " 'whether the individual has significant control over the enterprise's finances.' " Fiataruolo, 8 F.3d at 939 (quoting Hochstein, 900 F.2d at 547) (emphasis omitted). A number of factors are considered, including

> whether the person: (1) is an officer or member of the board of directors, (2) owns shares or possesses an entrepreneurial stake in the company, (3) is active in the management of the day-to-day affairs of the company, (4) has the ability to hire and fire employees, (5) makes decisions regarding which, when and in what order outstanding debts or taxes will be paid, (6) exercises control over daily bank accounts and disbursement records, and (7) has check-signing authority.

Fiataruolo, 8 F.3d at 939; Hochstein, 900 F.2d at 547. "The question of control... must be answered in light of the totality of the circumstances; no one factor is determinative." Fiataruolo, 8 F.3d at 939.

"[T]o be held responsible under § 6672 a person need not have the final word on which creditors are to be paid or how funds are to be allocated. At the same time, the significant control test is not meant to ensnare those who have merely technical authority or titular designation." Fiataruolo, 8 F.3d at 939. Accordingly, if an individual who possesses all the hallmarks of "significant control" can nevertheless establish that he or she did not exercise significant control as a matter of fact, the individual will not be a "responsible person" within the meaning of § 6672.

The second requirement for personal liability under the statute is that the individual's failure to collect, account for, or remit the holding taxes must be "willful[]." 26 U.S.C. § 6672 (a). "A person willfully fails to pay withholding taxes within the meaning of section 6672 when he pays other creditors with knowledge that withholding taxes are due." Hochstein, 900 F. 2d at 548. See Rem, 38 F. 3d at 643 ("The principal components of willfulness is knowledge: a responsible person acted willfully within the meaning of § 6672 (a) if he (a) knew of the company's obligation to pay withholding taxes, and (b) knew that company funds were being used for other purposes instead"). "Conduct amounting to no more than negligence is not willful for purposes of § 6672," but it is not

necessary to prove "evil motive or intent to defraud." Kalb v. United States, 505 F.2d 506, 511 (2d Cir., 1974). Willful action has been defined as " 'voluntary, conscious and, intentional — as opposed to accidental — decisions not to remit funds properly withheld to the Government.' " Id. Willful conduct may also include a "reckless disregard for obvious and known risks" as well as a "failure to investigate... after having notice that withholding taxes have not been remitted to the Government." Id. (quotation marks and citations omitted).

An individual against whom the IRS has made a § 6672 (a) assessment has the burden of proving by a preponderance of evidence that one or both of the elements of liability under that section is absent. See Rem, 38 F. 3d at 643 (citing Lesser v. United States, 368 F. 2d 306, 310 (2d Cir. 1996) (in banc)).

C. Applying These Prnciples in Unger's Case

Since Unger conceded at trial, as he does on appeal, that he knew that RLA was not fulfilling its withholding tax obligations and that other creditors were being paid in preference to the Government, there is no dispute about whether Unger was "willful" within the meaning of the statute. The only issue is whether Unger was a "responsible person" in light of his defense that he had no "effective authority to direct payment of corporate funds" and his claim that his "role was limited to acting as a mere scribe implementing the directions of Landau, the sole shareholder of RLA."

At the summary judgment stage, this case appeared to be on all fours with Rem. Rem joined a company run by his mother and father in 1977, having worked for a couple of years as a management consultant for banking and accounting firms. Rem later acquired 20% of the company's stock. Rem had a variety of corporate titles from 1977 until the company ceased operation in 1981. He was assigned the responsibility of conducting credit negotiations, and represented to various creditors that he was the company's president. Rem had signed checks for the company and had also signed at least

one credit agreement as "President and Secretary." 38 F. 3d at 637.

Rem knew that withholding taxes were required to be paid and that other creditors were being paid instead. Rem argued, however, that he had no actual control or position of responsibility with respect to the corporation's finances because it was his mother who decided what commercial creditors should be paid and she forbade him to pay the taxes. We held that while "[s]ome of the Fiataruolo/Hochstein factors were undeniably present," 38 F. 3d at 644, there was a genuine issue of material fact as to whether Rem in fact had significant control over the company's finances so as to be a "responsible person" within the meaning of § 6672. Id. At 645. The Court stated:

> [S]ince § 6672 was not meant to ensnare those who have merely a titular designation, Rem's contention that his title of president was spurious, being merely a device to induce commercial or financial organizations to grant the company credit, required a probing of the substance of that title, and we conclude that the district court's analysis did not view the evidence in the light most favorable to Rem.

Id. See also 38 F. 3d at 647 (Leval, J. concurring) ("The power to sign checks and the holding of corporate office are indeed factors that courts have listed as helpful in deciding whether an individual possessed the necessary power, but they are only factors. Either can exist in circumstances where the individual in reality does not possess significant control over corporate finances. When this is so, the potentially devastating 'responsible person' liability should not be imposed").

In this case, as in Rem, some of the "Fiataruolo/Hochstein" factors were present: Unger was an officer (indeed Senior Vice President and CFO) of RLA, he dealt with creditors and vendors on daily basis, he had check-signing authority and in fact signed checks

for the company, and he signed documents as "Senior Vice President." Also like Rem, Unger claims that despite his "technical authority," had no significant control or discretion to disburse corporate funds in reality. The crucial difference between Rem and this case, however, is its procedural posture. In Rem, the district court had decided on a summary judgment motion what the Court of Appeals held to be essentially a factual question that should have been left to the jury: whether, despite Rem's technical authority, he actually exercised significant control or merely followed the order of his superiors. Indeed, the Court in Rem specifically noted that "a trier of fact may well reach the same evaluation" as did the district court in that case, but that "the weighing of the evidence and the assessment of credibility were not appropriate for the determination of a summary judgment motion." 38 F. 3d at 645. In this case, by contrast, the jury has decided the very factual question at issue in Rem. The jury was instructed to consider Unger's actual authority in determining whether Unger possessed "significant control," and found against him. Accordingly, in considering whether to set aside the verdict and grant judgment as a matter of law for Unger, the only question for the district court (assuming the jury was properly instructed) was whether, considering the evidence in the light most favorable to the Government, and drawing all reasonable inferences that the jury might have drawn in the Government's favor, there was "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture." LeBlanc, 67 F. 3d at 429 (quotations marks omitted). In our view, the district court did not adhere to this strict standard in granting Unger judgment as a matter of law.

The district court rejected the jury verdict by a two-step process. First, the district court considered "the entirety of Unger's testimony" and concluded that Unger believed that "his actual authority was limited to following Landau's orders and that such belief was reasonable." 956 F. Supp. at 1157. This first step involves, in our view, an impermissible assessment of the credibility of a witness. Second, the district court concluded that there was no

evidence in the record that would authorize the jury to reject Unger's testimony. In reaching this conclusion, the district court both weighed the evidence and failed to consider the evidence in the light most favorable to the Government, contrary to the standard set forth in LeBlanc. The court discounted the testimony of Eugene Lewis that Unger did in fact make decisions regarding whether bills should be paid, on the basis that Lewis conceded he was not privy to any understanding that may have existed between Unger and Landau with respect to Unger's check-signing authority. 956 F. Supp. at 1157. In our view, the jury could reasonably have drawn an inference from this evidence, along with other evidence in the case, that Unger did in fact exercise significant control over the corporation's finances. That other evidence included the testimony of Lewis to the effect that Landau was ignored by his subordinates, did not act as a boss, and turned up to work only sporadically. Additionally, there was conflicting evidence as to whether Unger was aware of Landau's addiction and the extent to which Landau was incoherent. As the Government points out on appeal, RLA earned $30 million a year, employed some two hundred people, and issued thousands of checks during the Tax Period. The jury may well have concluded that a company of that size simply could not function if every check above a nominal amount had to be approved by Landau, especially in light Landau's absence from the office.

The district court also relied on the fact that the evidence "gave no clue as to Landau's motive in investing Unger" with the significant powers he possessed as Senior Vice President and CFO. 956 F. Supp. at 1156. In the district court's view, Landau may have cunningly placed Unger, a person whom he trusted yet a person with limited business experience, in a position of significant power within the company, so that he would have in place someone who would simply follow his wishes. Id. However, the district court's view as to the inferences to be drawn from holes in the evidence may not be substituted for the jury's assessment of the evidence. Moreover, to the extent that the evidence was deficient in this respect, it must be remembered that it was Unger's burden to establish by a preponderance of the evidence that he did not in fact exercise

significant control over the corporation's finances. Similarly, the district court's conclusion that despite three years of discovery, "the Government was not able to come up with a scintilla of evidence that would authorize a jury to reject Unger's testimony" fails to recognize that it was not the Government's burden to disprove significant control.

Underlying much of the district court's analysis was the proposition that the documentary evidence submitted by the government which indicated Unger's "technical authority" was "irrelevant" under Rem. This statement is incorrect. Such evidence will in most cases suffice to establish an individual's significant control over a company's finances. In a case where, as in Rem and as here, the individual's defense is that he or she was "barred by the orders of a superior from paying the taxes," Rem, 38 F.3d at 647 (Leval, J., concurring), that is, the individual did not effectively exercise control despite the outward appearances of authority, such documentary evidence may be irrelevant as to whether the individual in fact possessed the authority that the company's documents indicates the individual had. However, it remains the individual's burden to show that actual authority was in reality more limited than technical authority, and if the individual fails to meet that burden, a trier of fact may reasonably conclude that the documentary evidence of authority reflects the reality.

In sum, considering the evidence in the light most favorable to the Government and giving the Government the benefit of all reasonable inferences that the jury might have drawn, without assessing the weight of the evidence or passing on the credibility of the witnesses, we hold that the jury could have found that Unger failed to establish by a preponderance of the evidence that he did not actually possess significant control over the company's finances. Accordingly, the district court erred in granting Unger judgment as a matter of law. For this reason, we reverse the decision of the district court. We note that the Government also argues that the district court applied the incorrect standard for determining whether Unger was a responsible person under § 6672. According to the Government, neither Unger's actual belief nor the reasonableness of

that belief are relevant to the responsible person test under Rem and Hochstein. In holding that an individual has a defense if he or she can establish that she did not exercise significant control in fact, the court in Rem did not formulate any test for making that determination; nor did the court indicate to what extent subjective as opposed to objective considerations are relevant.[3] However, we decline to decide whether Judge Knapp's formulation was exactly consistent with the "responsible person" test under Rem because we find that the Government waived the issue when it failed to object to a jury instruction in the same terms.

1. Should Unger Be Granted a New Trial?

Unger argues that if this court determines that the district court improperly granted judgment as a matter of law, the Court should nevertheless remand the case to the district court for a new trial. Although Unger moved for a new trial and in fact "specifically abjured requesting a final judgment," Unger, 956 F. Supp. at 1159, the district court failed to make, contrary to Fed. R. Civ. P. 50 (c), an alternative ruling on the new trial motion once it had sua sponte granted Unger judgment as a matter of law. Accordingly, we must determine whether the case should be remanded to the district court either for a new trial or for the purpose of ruling on the new trial motion.

This Circuit has stated that "[a] less stringent standard applies to a motion for a new trial." Katara v. D.E. Jones Commodities, Inc., 835 F. 2d 966, 970 (2d Cir. 1987). A district court should grant a new trial motion if it "is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." Smith v. Lightning Bolt Productions, Inc.,

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[3]Contrast the court's articulation of the willfulness test, see Rem, 38 F.3d at 643 ("a responsible person's failure to cause the withholding taxes to be paid is not willful if he believed that the taxes were in fact being paid, so long as that belief was, in the circumstances, a reasonable one.").

861 F. 2d 363, 370 (2d Cir. 1988). Unlike a motion for judgment as a matter of law, a motion for a new trial may be granted even if there is substantial evidence to support the jury's verdict. See Bevevino v. Saydjari, 574 F. 2d 676, 683 (2d Cir. 1978); Song v. Ives Laboratories, Inc., 957 F.2d 1041, 1047 (2d Cir. 1992); see also 11 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2806, at 65 (2d ed. 1995). Also unlike a motion for judgment as a matter of law, a trial judge considering a motion for a new trial "is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner." Bevivino, 574 F.2d at 684. In view of the fact that the district court is in a "unique position to assess the credibility of the witnesses and to determine the weight which should be accorded their testimony," Song, 957 F.2d at 1047, we decline to sit in the place of the district judge in deciding whether Unger's new trial motion should be granted. Thus, the only question is whether we should remand the case to the district court to make that determination.

The Government argues that Unger should not receive a new trial because the jury verdict was, in the Government's words, "based in part on its evaluation of Unger's credibility," and was fully supported by the evidence. The Government cites to Sorlucco v. New York City Police Dep't, 971 F.2d 864, 875 (2d Cir. 1992), where this Court reversed a trial judge's grant of a new trial because the "trial court [had] overstepped its bounds and usurped the jury's function of judging credibility." Id.

The Government's claim that a trial judge may never grant a new trial where the jury's verdict is supported by the evidence is misguided. As stated above, the trial judge may overturn a jury's verdict, even where there is "substantial evidence" to support it, if the trial judge concludes, based on the weight of the evidence, that the verdict was seriously erroneous or the result was a miscarriage of justice. See Bevevino, 574 F.2d at 684-85. Further, the fact that the jury's verdict was, as the Government contends, "based in part on its evaluation of Unger's credibility" does not preclude the district judge's grant of a new trial. It is inherent in the proposition that the district judge may weigh the evidence that the

judge will consider the credibility of witnesses. See Song, 957 F.2d at 1047 (upholding grant of new trial in wrongful termination case where the evidence of unsatisfactory job performance "rested almost entirely on the testimony of [appellant's] co-workers regarding his allegedly poor inter-personal skills and professional relationships"). This is not to say that a district judge may freely substitute his or her assessment of the credibility of witnesses for that of the jury simply because the judge disagrees with the jury. See Bevevino, 574 F.2d at 685. A jury's credibility assessments are entitled to deference, see Tennant v. Peoria & Pakin Union Ry. Co., 321 U.S. 29, 35 (1944), and we have stated that "[w]here the resolution of the issues depended on assessment of the credibility of the witnesses, it is proper for the court to refrain from setting aside the verdict and granting a new trial." Metromedia Co. v. Fugazy, 983 F. 2d 350, 363 (2d Cir. 1992). However, these principles of deference to the jury do not override the trial judge's duty to "see that there is no miscarriage of justice." Bevevino, 574 F.2d at 684 (quoting 6A Moore's Federal Practice, ¶ 59.08(5), at 59-160 to 59-161 (1973)). "If convinced that there has been [a miscarriage of justice] then it is [the trial judge's] duty to set the verdict aside...." Id.

We do not believe that Sorlucco, on which the Government relies, forecloses the possibility of the new trial standard being met in this case. Sorlucco, a former probationary police officer with the New York City Police Department ("NYPD"), brought an action alleging , *inter alia*, that the NYPD had terminated her on the basis of gender in violation of 42 U.S.C.§ 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Sorlucco had been sexually assaulted by a fellow male officer, but failed to report the incident immediately, and then failed initially to implicate her true attacker, claiming at trial that she feared retaliatory conduct by him. Sorlucco was placed on modified assignment and subsequently terminated for falsely stating, at the time she filed the incident report, that she did not know the man who had raped her. (She disclosed his identity four days later). Her attacker, however, was never placed on any kind of restricted duty or otherwise disciplined, nor was there "any meaningful investigation into [his] conduct." 971 F.2d at 873.

At trial, Sorlucco presented facts concerning her treatment by the NYPD and the results of a NYPD study regarding the suspension and termination of probationary officers which indicated discriminatory treatment by the NYPD. The jury returned a verdict in favor of Sorlucco.

The district court granted NYPD's alternative motion for a new trial on the grounds that Sorlucco likely perjured herself. The contradictory evidence from which the court drew the conclusion that Sorlucco was lying was placed before the jury. The district court recognized at trial that the veracity of Sorlucco's testimony on the particular issue was a " 'straight credibility issue for the jury.' " 971 F.2d at 875. On appeal, this Court found that, in later granting the new trial motion, "the judge gave no reason for his change of mind." Id. Reversing the grant of a new trial, we stated that the district court had "overstepped its bounds and usurped the jury's function of judging credibility." Id.

Sorlucco illustrates the tension that exists when granting a motion for a new trial between two conflicting principles: the parties' Seventh Amendment right to a trial by jury and the power of the district court, also necessary to our jury system, to set aside a seriously erroneous verdict based on the weight of the evidence.[4] This tension is most acute where, as in this case[5] and in Sorlucco, the

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[4]See 11 Wright, Miller & Kane, § 2806, at 74 ("On the one hand, the trial judge does not sit to approve miscarriages of justice. The judge's power to set aside the verdict is supported by clear precedent at common law and, far from being a denigration or a usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it. On the other hand, a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter.") (footnotes omitted).

[5]Since the only evidence Unger presented on his own behalf to establish that he did not exercise significant control in fact was his own testimony, in finding against Unger, the jury must have rejected Unger's

result may turn in large part on the credibility of a single witness. While this makes the trial court's task in ruling on a new trial motion more difficult, it does not preclude the possibility that the motion may be granted. In Sorlucco, the Court of Appeals found that the trial judge had disagreed with the jury on the credibility of a key witness but did not explain how that difference of opinion lead to a miscarriage of justice. We do not read Sorlucco to mean that a trial judge can never substitute its view of the evidence for that of the jury, provided the judge is "convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." Smith, 861 F.2d at 370. Indeed, the court in Sorlucco reiterated this principle and there is no suggestion in the opinion that the panel was setting a new standard or altering, sub silentio, the well-established principles for granting a new trial set forth above. Accordingly, we remand the case to the district court to determine whether Unger's motion for a new trial should be granted.

D. Application of These Principles to Landau

Landau contends that his drug and alcohol addiction negated both prongs of § 6672 liability. According to Landau, he could not have been a "responsible person" because he lacked effective control due to his compulsive and excessive use of cocaine and alcohol, and even if he was a "responsible person," he could not be regarded as having willfully failed to remit the taxes because his substance abuse had such a severe effect on him that he could not know that the taxes were unpaid. For the reasons that follow, we reject both of these claims.

We agree with the district court that voluntary intoxication cannot be a defense to responsible person liability under § 6672 in the circumstances of this case. Employers are required to withhold

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testimony. As stated above, however, this does deprive the district judge of the power to set aside the verdict, although it will be a rare occasion on which such action is justified.

federal income and social security taxes from their employees' wages. These sums are held "in trust" for the government. See 26 U.S.C. § 7501 (a). An employer that fails to remit the taxes is liable to the government, but the government has no recourse against the employee. Congress enacted § 6672 to protect the government from losing these "trust funds" by providing alternate sources from which to collect the withheld taxes. See Fiataruolo, 8 F.3d at 938; Rem, 38 F.3d at 646. To permit the CEO and owner of a company, the person with the ultimate authority over the company's financial affairs, to escape liability by claiming that he or she was so addicted to cocaine and alcohol as to lack significant control in fact would defeat the purpose of the statute. This is particularly true on the facts of this case, where throughout the Tax Period Landau continued to act as CEO and to draw down a salary of half a million dollars, while exposing his subordinates (who earned much less) to a personal liability for the withheld taxes in an amount of over $1 million.

Similarly, we hold that an individual's drug addiction does not preclude a finding that an individual willfully failed to remit the withholding taxes, at least where that individual is the CEO and owner of the company. Although this issue does not appear to have been addressed in the context of § 6672, we note that in analogous bankruptcy cases, courts have refused to recognize drug addiction as a defense to liability. See, e.g., In re Berzon, 145 B.R. 247, 251 (Bankr. N.D. Ill. 1992) (holding that debtor's cocaine habit did not preclude a finding that he willfully failed to file tax returns); In re Correa, 58 B.R. 88 (Bankr. N.D. Ill. 1986) (holding that debtor's failure to attend creditors' meeting and failure to disclose certain information constituted a willful failure to abide by court orders despite cocaine addiction).

Landau argues that drug addiction is analogous to incapacitation due to physical illness, and that such incapacitation has been held to be a defense to § 6672 liability. See Young v. United States, 609 F. Supp. 512, 518 (N.D. Tex. 1985) (holding that the degree to which a stroke affected the ability of the president of the corporation to understand and participate in the affairs of the corporation during the relevant time period was a question for the

jury); see also Sherwood v. United States, 246 F. Supp. 502, 508 (E.D.N.Y 1965) (finding that the president and CEO had no duty to pay taxes under § 6672 during period of incapacitation due to illness and that, even if he had such a duty, his failure to pay was not willful). We disagree. Even if, as Landau claims, his addiction prevented him from exercising his authority, or understanding that the taxes were due, his addiction does not justify or excuse his failure to remit the taxes because it flowed from a voluntary decision to use narcotics and alcohol.

Although we are in agreement with he district court that voluntary intoxication is no defense to § 6672 liability in this case, we note that we find some of the lower court's reasoning troubling. In particular, we do not believe that it is helpful to draw an analogy to criminal law. It is somewhat confusing, in our view, to rely on general criminal law principles as to general and specific intent crimes when this Court has specifically held that "willful" conduct under § 6672 is not the same as "willful" conduct in the criminal context. See Gerald B. Lefcourt, P.C. v. United States, 125 F. 3d 79, 82-83 (2d Cir. 1997) (holding that Cheek v. United States, 498 U.S. 192 (1991), where the Supreme Court held that "willful" in criminal tax penalty statute required the government to prove specific intent to violate the law, did not apply where the taxpayer faced only a civil penalty). It is well established in this Circuit that "willful" in § 6672 describes conduct that is voluntary, conscious and intentional — as opposed to accidental" and does not require an evil motive or intent to defraud. Rem, 38 F.3d at 643. Accordingly, we decline to muddy the waters by importing any criminal notions of specific or general intent into § 6672 for the purpose of determining whether the defense of voluntary intoxication is available under § 6672. We simply hold, as a matter of policy, that it is not.

E. Unger and Landau's Statute of Limitations Defense

Unger and Landau argue that § 6501 (a) of the Internal Revenue Code provides a three year statute of limitations for assessing a penalty pursuant to § 6672 and that the tax returns in this

case were filed beyond the three year period. See 26 U.S.C. § 6501 (a). The assessment of the penalty was made on November 23, 1987, and the tax returns were filed in April, July and October 1984, for the quarters ended March 30, June 30 and September 30, 1984 respectively.

We hold that both Unger and Landau have waived any possible statute of limitations defense. "A claim that a statute of limitations bars a suit is an affirmative defense, and, as such, it is waived if not raised in the answer to the complaint." Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc., 967 F.2d 742, 751-52 (2d Cir. 1992) (citing Fed. R. Civ. P. 8 (c)). Unger and Landau first raised the defense on October 18, 1994, when they moved for summary judgment on the ground that the Government's assessment against each of them was beyond the applicable statute of limitations. However, the district court had already ruled, some eight months earlier, on the Government's motion for summary judgment on its claim against Landau and its counterclaim against Unger.

III. CONCLUSION

For the foregoing reasons, the decision of the district court granting Unger judgment as a matter of law is reversed, and the case is remanded to the district court to determine whether a new trial should be granted, and the decision of the district court granting the Government judgment as a matter of law against Landau is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
Third-Party Plaintiff,

OPINION AND ORDER
90 Civ. 0384

-against-
ROBERT LANDAU,
Third-Party Defendant.

WHITMAN KNAPP, SENIOR DISTRICT JUDGE

This is an action by the Government as third-party plaintiff against third-party defendant Robert Landau ("Landau") to reduce to judgment a $1,046,376.30 penalty assessed against him pursuant to 26 U.S.C. Section 6672 ("Section 6672"). Such penalty was assessed against Landau after his company, Robert Landau Associates Inc. ("RLA"), failed to remit to the IRS $1,046,376.30 it had withheld from its employees' paychecks during the first three quarters in 1984 (" the tax period").

At a jury trial, held in December of 1996, Landau's principal defense was that his extreme addiction to alcohol and cocaine deprived him of the ability to function in his normal capacity, or to comprehend the circumstances around him sufficiently to justify the assessed penalty. The jury found in Landau's favor. The Government has now moved pursuant to Rule 50(b) of the Federal Rules of Civil Procedure for judgment as a matter of law against him. In support of its motion the Government advances two separate theories: (1) that intoxication cannot as a matter of law be a defense to liability under section 6672; and (2) evidence at trial overwhelmingly established that Landau was able effectively to exercise significant control over RLA's finances. For reasons that follow, the Government's motion is granted on the first theory.

Accordingly, we have no occasion to consider the second.

It has been the Government's contention from the outset that intoxication — no matter what its extent — could not be a defense to the assertion that the intoxicated individual was a responsible person pursuant to Section 6672. At the outset we accepted this contention, but then reconsidered and concluded that the question should be left in the first instance to a jury so that it could be reviewed on a full record. At trial, over the Government's objection, we advised the jury that intoxication could be a defense, albeit "a very narrow defense;" and that it "could only be a defense if ... [it] meant that he didn't know and couldn't know what he was doing and had no capacity to remember." Tr. at 812-13. The jury found that Landau fell within this narrow definition, and was therefore not a responsible person. For present purposes, we assume that the evidence fully supports the jury's verdict.

DISCUSSION

There is no Second Circuit — or as far as we can determine any — case precisely on point, i.e., determining one way or another whether intoxication can support a finding that a person was not "responsible" within the meaning of Section 6672. However, we believe that the sum total of all relevant decisions leads unerringly to the conclusion that it is legally impossible for intoxication — whatever its extent — to be the basis of such a finding.

As a general principal of criminal law, voluntary intoxication may only be a defense to crimes involving "specific intent" — a mental element greater than that of "general intent." See, e.g., United States v. Torniero (2d Cir. 1984) 735 F.2d 725, 733 (intoxication is a defense only where it precludes formation of the mens rea constituting an element of the offense charged); United States v. Klein (8th Cir. 1994) 13 F.3d 1182, 1183. By contrast, "[f]or general intent crimes evidence of voluntary intoxication is not an acceptable method of negating the required intent." See, e.g., United States v. Bennett (6th Cir. 1992) 975 F.2d 305, 308 (citations omitted). By analogy, therefore, if a civil statute does not require

proof of specific intent then voluntary intoxication may not be a valid defense. See, e.g., Allstate Ins. Co., v. Sherrill (E.D. Mich. 1983) 566 F.Supp. 1286, 1288 (because voluntary intoxication may not be asserted as a defense to a criminal charge of robbery, kidnaping and sexual assault — general intent crimes — it could not be a defense in a civil action arising out of such conduct).

Moreover, intoxication due to an addiction to alcohol and cocaine — no matter how severe — is considered voluntary as a matter of law. See, e.g., United States v. Williams (3rd Cir. 1989) 892 F.2d 296, 303 (excessive drinking by an alcoholic constituted voluntary intoxication); In re Dolin (6th Cir. 1986) 799 F.2d 251, 253 n.1 (drug use by addict was voluntary "because a chemical addiction flows from a decision to use narcotics. Such a decision was at least initially voluntary."); United States v. F.D.L. (8th Cir. 1988) 836 F.2d 1113, 1117 (ingestion of drugs because of drug addiction is not involuntary); In re Correa (Bankr. N.D. Ill. 1986) 58 B.R. 88, 90-91 ("debtor's drug addiction was a plight that resulted from his volitional conduct and ... provides no justification" against a finding that his failure to obey the court's orders was willful). Accordingly, Landau's alleged incapacitation due to his addiction must be assessed within the legal principles governing voluntary intoxication.

The question before us, therefore, is whether section 6672 requires a showing of specific intent. Although we are only concerned with the responsible person element of Section 6672, and not willfulness, it would be anomalous to hold that intoxication may not be a defense to a finding of willfulness under Section 6672 but that it might be a defense to a finding that one was a responsible person. Thus, any decision on the question of whether or not willfulness under Section 6672 requires proof of specific intent is instructive on the precise question before us.

To establish the element of willfulness under Section 6672 the Government must prove that an individual acted voluntarily, knowingly, consciously and intentionally, as opposed to accidentally or mistakenly. See, e.g., United States v. Rem (2d Cir. 1994) 38 F.3d 634, 643; Kalb v. United States (2d Cir. 1974) 505 F.2d 506, 511. Knowingly — the term we used in our charge to the jury —

"normally signifies a requirement of general, not specific intent." See, e.g., United States v. Sneezer (9th Cir. 1990) 900 F.2d 177, 179. Moreover, willful conduct under Section 6672 "may also indicate a reckless disregard for obvious and known risks," and includes "failure to investigate or correct mismanagement after having notice that withholding taxes have not been remitted to the Government." See, e.g., Kalb, 505 F.2d at 511.

Specific intent crimes also require proof that the individual acted with bad purpose. See, eg., United States v. Phillips (11th Cir. 1994) 19 F.3d 1565, 1576-77. With respect to Section 6672, the case law is clear that "bad purpose or evil motive" in failing to collect and pay the taxes is not required for a finding of willfulness. See, e.g., Monday v. United States (7th Cir. 1970) 421 F.2d 1210, 1216, cert. denied (1970) 400 U.S. 821); Rem, 38 F.3d at 643. Thus, it cannot be said that liability under Section 6672 requires a finding of specific intent. See, e.g., Thomsen v. United States (1st Cir. 1989) 887 F.2d 12, 17; Peterson v. United States (N.D. Ill. 1990) 758 F. Supp. 1209, 1216; and Sfeir v. United States v. Melancon (W.D.La 1989) 1989 W.L. 104782, at * 3 (collectively holding that "[l]iability under Section 6672 does not depend upon the presence of evil motive or specific intent to defraud the Government or deprive it of revenue") (citations omitted, emphasis added).

Accordingly, voluntary intoxication may not as a matter of law negate an assertion that a person was responsible within the meaning of Section 6672, no matter the extent of that intoxication.

The two cases on which Landau relies are not to the contrary, In re Keith, (E.D.Va. 1978) 1978 WL 1160; and Sherwood v. United States (E.D.N.Y. 1965) 246 F.Supp. 502. While both cases considered an individual's physical illness to be a possible justification for the failure to remit withheld taxes as required by Section 6672, both involved wholly involuntary conditions. In Sherwood the court found that the corporation's president was justified in not remitting the withheld taxes because illness, requiring hospitalization, effectively prevented him from acting in his corporate capacity. There was no suggestion that the illness had resulted from a voluntary act. 246 F.Supp. At 507. In re Keith

involved a claim against an individual suffering from high blood pressure leading to severe kidney problems. 1978 Wl 1160, at * 3. Distinguishing the case from Sherwood, the court found that despite his physical illness there was no justification for his failure to remit the withheld taxes because except during a short period of time when he was hospitalized. Again, there was no suggestion that the illness resulted from a voluntary act. Id. At * 7.

CONCLUSION

Based on the foregoing, we find that Landau's addiction to alcohol and cocaine may not as a matter of law negate the conclusion that he was a responsible person during the relevant tax period. Accordingly, we grant the Government's motion for judgment as a matter of law against Landau. Let the Government submit a proposed judgment.

SO ORDERED.
New York, New York
March 17, 1997

WHITMAN KNAPP, SENIOR U.S.D.J

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APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT COURT OF NEW YORK

NATHAN UNGER,
Plaintiff,
-against-
UNITED STATES OF AMERICA
Defendant.

MEMORANDUM AND ORDER
90 Civ. 0384 (WK)

UNITED STATES OF AMERICA,
Third-Party Plaintiff,
-against-
ROBERT LANDAU
Third-Party Defendant.

WHITMAN KNAPP, SENIOR D.J.

Third-Party defendant Landau moves for reconsideration of our Memorandum and Order dated February 17th granting the Government's motion for summary judgment. He claims that we erroneously concluded that there is no material question of fact as to his willfulness and, secondly, (a point not heretofore raised) that we erred in failing to analyze the particular points of time as to when his "willfulness" existed. As to the second point, it was not previously raised and no excuse for such omission has been offered. It is therefore not properly before us. As to the first point, however, we are concerned that we may have erred in our conclusion that our own interpretation of the medical evidence, taken together with the third-party defendant's testimony, is the only possible reasonable interpretation. We therefore grant third-party defendant's motion so that such interpretation may be submitted to a trier of fact.

This conclusion highlights what has seemed to us the gross inequity of the result we felt forced to reach with respect to the plaintiff Unger. Should a jury (which would know nothing of

Unger's situation) find that Landau's mental condition absolved him of liability for the very acts which he forced Unger to commit (and for which Unger must pay close to two million dollars), the result would be, to say the least, bizarre. Accordingly, we shall certify to the Court of Appeals pursuant to 28 U.S.C. § 1292 (b) both the question presented by our grant of Landau's present motion and by our February 17th decision granting the government's motion for summary judgment against Unger.

Section 1292 (b) requires that we make two findings: (1) that the certified order "involves a controlling question of law as to which there is a substantial ground for difference of opinion" and (2) that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

With respect to our grant of Landau's motion to reconsider, it is obvious that reasonable minds could differ as to whether or not we are now correct in reconsidering our February 17th decision. With respect to our decision to grant summary judgment against Unger, we can not say that reasonable minds could differ as to the current Second Circuit controlling law. However, reasonable minds could well differ as to whether or not the Court of Appeals should en banc the question and change the existing law. As to that, we know that the present Chief Judge strongly dissented from the presently controlling opinion and that least one out of circuit judge agrees with him. U.S. v. Vaccarella (S.D. Ill. 1990) 735 F. Supp. 1421. We also know that neither of the judges constituting the majority in the controlling case would now participate in an en banc reconsideration thereof. Therefore, it seems obvious that reasonable minds could differ as to whether or not an en banc should be held, and what its outcome would be.

Turning to the question of whether an immediate decision by the Court of Appeals would materially advance the ultimate determination of the litigation, it seems obvious that, considering the millions of dollars involved, these questions are going to reach the Court of Appeals either now or later, and that time would be saved by the earliest possible resolution of the problems.

CONCLUSION

Third party defendant Landau's motion for reconsideration is granted, and, as above stated, the relevant questions are certified to the Court of Appeals pursuant to 28 U.S.C. § 1292 (b).

SO ORDERED.

March 16, 1994
New York, New York

WHITMAN KNAPP, SENIOR U.S.D.J

APPENDIX D

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19 day of November one thousand nine hundred and ninety-eight.

UNGER

v.

UNITED STATES OF AMERICA

Docket No. 97-6139

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant ROBERT LANDAU

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
CAROLYN CLARK CAMPBELL, Clerk

By:_____
Beth J. Meador-Administrative Attorney

APPENDIX E

INTERNAL REVENUE CODE (**AMENDED 1996**), § 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax

(a) General rule.--Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable.

(b) Preliminary notice requirement.--

(1) In general.--No penalty shall be imposed under subsection (a) unless the Secretary notifies the taxpayer in writing by mail to an address as determined under section 6212 (b) that the taxpayer shall be subject to an assessment of such penalty.

(2) Timing of notice.--The mailing of the notice described in paragraph (1) shall precede any notice and demand of any penalty under subsection (a) by at least 60 days.

(3) Statute of limitations.--If a notice described in paragraph (1) with respect to any penalty is mailed before the expiration of the period provided by section 6501 for the assessment of such penalty (determined without regard to this paragraph), the period provided by such section for the assessment of such penalty shall not expire before the later of --

(A) the date 90 days after the date on which such notice was mailed, or

(B) if there is a timely protest of the proposed assessment, the date 30 days after the Secretary makes a final administrative determination with respect to such protest.

(4) Exception for jeopardy.--

This subsection shall not apply if the Secretary finds that the

collection of the penalty is in jeopardy.

(c) Extension of period of collection where bond is filed.--

(1) In general.--If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made against any person, such person--

(A) pays an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his liability for such penalty,

(B) files a claim for refund of the amount so paid, and

(C) furnishes a bond which meets the requirements of paragraph (3),

no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until a final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

(2) Suit must be brought to determine liability for penalty.-- If, within 30 days after the day on which his claim for refund with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a proceeding in the appropriate United States district court (or in the Court of Claims) for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the 30-day period referred to in his paragraph.

(3) Bond.--The bond referred to in paragraph (1) shall be in such form and with such sureties as the Secretary may by regulations prescribe and shall be in an amount equal to 1-1/2 times the amount of excess of the penalty assessed over the payment described in paragraph (1).

(4) Suspension of running of period of limitations on collection.-- The running of the period of limitations provided in

section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(5) Jeopardy collection.--If the Secretary makes a finding that the collection of the penalty is in jeopardy, nothing in this subsection shall prevent the immediate collection of such penalty.

(d) Right of contribution where more than 1 person liable for penalty.--If more than 1 person is liable for the penalty under subsection (a) with respect to any tax, each person who paid such penalty shall be entitled to recover from other persons who are liable for such penalty an amount equal to the excess of the amount paid by such person over such person's proportionate share of the penalty. Any claim for such a recovery may be made only in a proceeding which is separate from, and is not joined or consolidated with --

(1) an action for collection of such penalty brought by the United States, or

(2) a proceeding in which the United States files a counterclaim or third-party complaint for the collection of such penalty.

(e) Exception for voluntary board members of tax-exempt organizations.--No penalty shall be imposed by subsection (a) on any unpaid, volunteer member of any board of trustees or directors of an organization exempt from tax under subtitle A if such member--

(1) is solely serving in an honorary capacity,

(2) does not participate in the day-to-day or financial operations of the organization, and

(3) does not have actual knowledge of the failure on which such penalty is imposed.

The preceding sentence shall not apply if it results in no person being liable for the penalty imposed by subsection (a).

APPENDIX F

INTERNAL REVENUE CODE, § 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax

(a) General rule.--Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

(b) Extension of period of collection where bond is filed.--

(1) In general.--If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made against any person, such person--

(A) pays an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his liability for such penalty,

(B) files a claim for refund of the amount so paid, and

(C) furnishes a bond which meets the requirements of paragraph (3),

no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until a final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(2) Suit must be brought to determine liability for penalty.--

If, within 30 days after the day on which his claim for refund

with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a proceeding in the appropriate United States district court (or in the Court of Claims) for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the 30-day period referred to in his paragraph.

(3) Bond.--The bond referred to in paragraph (1) shall be in such form and with such sureties as the Secretary may by regulations prescribe and shall be in an amount equal to 1-1/2 times the amount of excess of the penalty assessed over the payment described in paragraph (1).

(4) Suspension of running of period of limitations on collection.-- The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(5) Jeopardy collection.--If the Secretary makes a finding that the collection of the penalty is in jeopardy, nothing in this subsection shall prevent the immediate collection of such penalty.